91-156 (1)

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OTIE JONES, INDIVIDUALLY AND AS WARDEN OF THE MORGAN COUNTY REGIONAL CORRECTIONAL FACILITY, and M.C. HAMBY, ASSOCIATE WARDEN,
Petitioners,

v.

MARIAM LONG, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it was clearly established in 1984-85 that prison wardens lose their qualified immunity for violation of a prison visitor rule, not giving rise to a § 1983 action, which threatened inmates' liberty interest in visitation found by the Sixth Circuit to be created by another rule?

2. Whether lawful incarceration warrants the establishment of a "bright line" that prison regulations should not create liberty interests protected by the Due Process Clause except when they involve the duration of, release from, or the very nature of confinement?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceeding before the Sixth Circuit are as follows:

Defendants-Appellants-Petitioners

1. Otie Jones, Warden, Morgan County Regional Correctional Facility (MCRCF)
2. M.C. Hamby, Associate Warden, MCRCF

Plaintiffs-Appellees-Respondents

1. Curtis Long, inmate at MCRCF
2. Mariam Long, wife of Curtis Long
3. Ronnie S. Mills, inmate at MCRCF
4. Karen Mills, wife of Ronnie S. Mills
5. James Marlin Hodges, inmate at MCRCF
6. Anita Simmers, fiancee of James Marlin Hodges

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 3, 1991, a petition for rehearing having been denied by order of the Sixth Circuit entered on April 29, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991), and a copy of the slip opinion appears in the Appendix hereto at 1a. The memorandum decision of the United States District Court for the Eastern District of Tennessee also appears in the Appendix hereto at 15a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on April 3, 1991, and an order denying a petition to rehear was entered on April 29, 1991. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE POLICIES INVOLVED:

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. Amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State of Tennessee Department of Corrections Administrative Policies and Procedures. *See* Appendix at 24a-87a.

STATEMENT OF THE CASE

At the time this action arose in 1984 and 1985, Petitioner, Otie Jones, was the Warden in Tennessee of the Morgan County Regional Correctional Facility (MCRCF), a state prison facility. Petitioner M.C. Hamby was the Associate Warden. Three consolidated actions under 42 U.S.C. § 1983 for damages were brought against these Wardens by three male inmates at MCRCF and their wives or fiancees alleging that the Wardens violated certain of the prison's visitation policies regarding the searching of prison visitors. Plaintiffs claim that these violations infringed the inmates' First Amendment freedom of association to receive visitors, the Fourth Amendment right of prison visitors to be free of strip and/or body cavity searches without probable cause, and the inmates' right of due process under the Fourteenth Amendment. These applicable prison visitation regulations were contained within the State of Tennessee Department of Correction Administrative Policies and Procedures which, in the section concerning the searching of visitors, required probable cause to order strip and/or body cavity searches of visitors. App. at 28a. Another section of the policies required a showing of good cause to suspend an inmate's visitation rights. App. at 67a.

The complaints allege that, in order to visit the plaintiff-inmates, the female visitors were required to consent to strip searches and/or body cavity searches which they generally consented to, failure to do so being cause under the prison policies to suspend a visitor's right to see an inmate. App. at 52a. At one point, the right of one of the wives to visit her husband was suspended for 60 days due to her unwillingness to consent to a body cavity search. This is the only suspension of any visitor's right alleged in the case. The complaints do not allege that the rights of the male prisoners to receive visitors ever was suspended. In fact the inmates' right to receive visitors never was suspended.

Petitioners filed motions for summary judgment claiming qualified immunity protection. The district court denied summary judgment holding that the Wardens were not entitled to qualified immunity on the basis that the Fourth Amendment right of prison visitors to be free of strip and body cavity searches without probable cause or reasonable suspicion was clearly established in the Sixth Circuit at the time this action arose in 1984 and 1985. The complaints only alleged the searches were made without probable cause and did not allege they were made without reasonable suspicion. Also, the district court held that the First Amendment freedom of association of inmates to receive visitors was also clearly established at the time the action arose.

The Sixth Circuit reversed in part holding that the Wardens were entitled to qualified immunity on the alleged Fourth Amendment violation of prison visitors' right to be free of searches without probable cause. The visitor search rule required probable cause to order the strip search or body cavity search of visitors. The Sixth Circuit found no constitutional violation because the right of visitors to be free of strip and/or body cavity searches without probable cause was not clearly established in the Sixth Circuit in 1984 and 1985. App. at 8a-10a. Although no constitutional violation was involved, the visitor searches nonetheless violated the prison rule requirement that visitors not be strip searched except for probable cause. The Sixth Circuit also reversed in part holding that the Wardens were protected by qualified immunity on the First Amendment violation of inmates' freedom of association to receive visitors. The Court held that this right also was not clearly established in the Sixth Circuit at the time the action arose. App. at 13a-14a.

The Sixth Circuit affirmed in part holding that the violation of the visitor search rule, and subsequent suspension of a particular visitor who refused to submit to

a search in order to visit an inmate, was a threat to the inmates' liberty interest to receive visitors. App. at 10a-13a. The Court of Appeals determined that this liberty interest was created by a different section of the policy concerning inmates' visitation rights. App. at 11a-12a. The Sixth Circuit did not find that the Wardens violated any substantive constitutional right belonging to the respondents. Nor did the Sixth Circuit find that the Wardens directly violated the inmates' liberty interest to receive visitors but instead found that the suspension of a wife's right to visit her inmate husband, due to her unwillingness to submit to a search, threatened or chilled the inmates' right to receive visitors. The inmates' right to receive visitors was never suspended.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT CONCERNING THE STANDARDS TO BE APPLIED TO DETERMINE IF PRISON OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY PROTECTION FOR VIOLATION OF THEIR OWN ADMINISTRATIVE RULES.

The administration of state prisons, in this age of burgeoning prison populations, is—at best—always difficult. The potential that wardens will be faced with personal liability for violation of their own prison rules presents these officials with very confusing and difficult dilemmas. This area of prison administration is made doubly difficult when there is the potential that a liberty interest may be created by the prison officials' own rules. Prison officials are called upon daily to make a broad spectrum of administrative decisions concerning the full range of prison life. These diverse decisions can and do interact with, and in some way affect or conflict with, an interest created under another rule which may have sufficient mandatory language to be considered a liberty interest. Whether or not such interaction between diverse

rules will cause a warden to lose his immunity is a very difficult puzzle for judges and lawyers to solve, much less prison officials. Even the Sixth Circuit below stated that "we venture once more into the *labyrinth* of deciding what makes a right 'clearly established' for purposes of qualified immunity." App. at 5a (emphasis added). If solving this puzzle is a labyrinth for court of appeals judges, then prison wardens are faced with negotiating a mine field. This case presents an important question affecting general prison administration throughout the states regarding the potential personal liability of prison officials when their administrative actions result in violation of their own rules. Petitioners urge this Court to give guidance and clarification in this important area of prison administration.

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Id.* at 194. On that occasion, this Court explicitly refused to create a new rule which would remove officials' qualified immunity for violation of a clear state regulation because such a rule would make state officials "liable in an indeterminate amount for violation of *any* constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation—merely because their official conduct also violated some statute or regulation." *Id.* at 195. In *Davis*, the regulation which was clearly violated did not itself give rise to the § 1983 action, as is the case here. The Court explained this distinction as follows:

> [O]fficials sued for violation of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation. Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action

> for damages. . . . Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon.

468 U.S. at 193 n.12 (emphasis in original).

A. The Sixth Circuit's Decision Conflicts With The Decisions Of This Court By Forfeiting Prison Warden's Qualified Immunity For Violation Of A Prison Rule, Not Giving Rise To The § 1983 Action, Which Threatened A Liberty Interest Created By Another Rule.

In the decision below, the Sixth Circuit while acknowledging this Court's decision in *Davis v. Scherer*, clearly misstated the *Davis* rule in its following statement: "As we have stated, 'The Supreme Court has determined that violation of a clearly established state regulation is sufficient to cause officials to forfeit their qualified immunity' for claims of deprivation of federal constitutional guarantees." [1] App. at 10a. Of course, the holding in *Davis v. Scherer* is that violation of a clear state regulation does not cause officials to lose their qualified immunity when sued for constitutional violations unless the rule itself gives rise to the cause of action. Standing the *Davis* rule on its head, the Sixth Circuit has in effect adopted a new qualified immunity rule directly conflicting with this Court's prior refusal to adopt such a rule. In *Davis* a new qualified immunity rule was proposed to be "limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights." 468 U.S. at 195. This Court, refusing to open the door to such a liberalized rule, explained that

> once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner. Federal judges would be granted large discretion to ex-

[1] Quoting from *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

> tract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity. And such judgments fairly could be made only after an extensive inquiry into whether the official in the circumstances of his decision should have appreciated the applicability and importance of the rule at issue. It would become more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation.

468 U.S. at 195-96.

The Sixth Circuit, based upon the criteria first clearly established in *Kentucky Dept. of Corrections v. Thompson*, —— U.S. ——, 109 S.Ct. 1904 (1989), determined that section 507.01 of the Tennessee Department of Corrections policies regarding visitation rights of inmates created a liberty interest in visitation. App. at 11a. The Sixth Circuit erroneously concluded that, because the inmate visitation rule was couched in sufficiently explicit mandatory language, an indirect threat to the inmates' visitation right as a result of the Wardens violating a different visitor search rule and the subsequent suspension of the right of one particular visitor to visit her husband after her refusal to submit to the search, "violated clearly established law." App. at 12a. The "clearly established law" that the Sixth Circuit referred to was this Court's decision in *Thompson*, which is not a qualified immunity case but rather is the case which first clearly established the standards by which a state may create a liberty interest in prison visitation rules when the rule uses "explicitly mandatory language" in connection with the establishment of "specific substantive predicates to limit discretion." 109 S.Ct. at 1910.

Since the rule which the Court found that the Wardens clearly violated, Section 506.06 of the prison policies on "Searches," App. at 28a, by conducting strip searches of visitors without probable cause, did not result (as

determined by the Sixth Circuit) in any constitutional violation, it provided no basis for a § 1983 action against the Wardens. Nor did the Sixth Circuit actually find a direct violation of the inmate visitation rule and resulting liberty interest but only "[t]hreats to remove this visitation right." App. at 12a. Absent a clear violation of the "rights that give rise to the cause of action for damages," officials do not lose their immunity. *Davis*, 468 U.S. at 194 n.12. The Court of Appeals erred in removing the Wardens' qualified immunity for violation of a different rule other than the inmate visitation regulation. An indirect threat of the inmates' liberty interest, which the Court found created by the inmate visitation rule, does not give rise to any protection under the Due Process Clause. The Sixth Circuit's decision clearly violates this Court's ruling in *Davis* that "officials sued for violation of rights enforced by a . . . regulation . . . do not forfeit their immunity by violating some *other* . . . regulation." *Id.* (emphasis in original).

B. The Legal Standard Applied By The Court Of Appeals, To Determine If The Inmate Visitation Rule Created A Liberty Interest, Was Not "Clearly Established" Until Four Years After The Officials' Action —In Violation Of This Court's Requirements.

Although the Sixth Circuit acknowledged the "objective legal reasonableness" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), "assessed in light of the legal rules that were 'clearly established' at the time [the official action] was taken," *Anderson v. Creighton*, 638 U.S. 635, 639 (1987), it nonetheless erred in applying legal standards first clearly established by this Court's *Thompson* decision in 1989 to test whether the 1984-85 actions of the Wardens violated a protected liberty interest. *See also Mitchell v. Forsyth*, 472 U.S. 511 (1985)[2]. Until *Thompson*, decided four years after the

[2] Officials are immune unless the law clearly proscribes the actions taken. *Harlow v. Fitzgerald, supra.* "[O]fficials can act without fear

official conduct challenged in this case, the standards simply were not clearly established to determine if prison visitation regulations create a liberty interest subject to the Due Process Clause. In *Harlow* this Court stated that "[i]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. In spite of this, the Sixth Circuit reasoned that applying *Thompson's* criteria to the Wardens' actions in 1984 and 1985 "does not violate the rule that public officials are accountable only for laws that were clearly established at the time of their actions," because "*Thompson* reflected the state of clearly established law in 1985—the time of the visitation in that case." App. at 11a n.4. This twisted logic clearly violates the requirements of *Harlow* and *Anderson*. This Court's 1989 *Thompson* decision cannot be applied in this case to determine if the Wardens' conduct in 1984 and 1985 is to be protected by qualified immunity. The Wardens could not know then what this court would establish four years later as the applicable standards to determine if a prison visitation rule created a liberty interest. Nor could they have known that they might lose their immunity if they violated some general rule which affected or threatened the right protected under a liberty interest then unknown to them.

Also in *Anderson v. Creighton*, 638 U.S. 635 (1987), this Court established the requirement that, in testing qualified immunity protection, determination is to be

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of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer, supra*, at 195. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson, supra* at 640.

made whether a reasonable official could have believed that his actions comported with constitutional requirements even though it actually did not. The Sixth Circuit failed to make this inquiry. Had it done so, it readily could have found that the Wardens could have believed their actions did not violate any liberty interest and violated no due process requirement. The Wardens could have believed, on the basis of this Court's decision in *Hewitt v. Helms*, 459 U.S. 460 (1983), as specifically noted in *Thompson*, "that the denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence,' *Hewitt v. Helms*, 459 U.S., at 468, 103 S. Ct., at 869, and therefore is not independently protected by the Due Process Clause." 109 S.Ct. at 1909; *accord*, *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir.), *cert. denied*, 469 U.S. 485 (1984), a prisoner has no constitutional right to meet with a particular visitor of his choice; a visitor has no constitutional right to visit a particular inmate.

There appears to be no question that the inmate received some notice that his wife's visitation right had been suspended for her unwillingness to submit to a search. The inmates at MCRCF have the right to file a grievance over any non-disciplinary matter including visitation. App. beginning at 78a. The Wardens could have believed that the availability of the grievance procedure met the due process requirements for a threatened liberty interest in light of the existing decision of this Court in *Hewitt*. There, faced with a clear liberty violation regarding disciplinary action against an inmate being placed into restrictive confinement, this Court held the prisoner was entitled only to "an informal, nonadversary evidentiary review" and the "inmate must merely receive some notice of the charges against him and an opportunity to present his views. . . ." 459 U.S. at 476. According to *Hewitt*, "[o]rdinarily a written statement by the in-

mate will accomplish this purpose. . . ." *Id.* The due process proceeding need not occur prior to the action which allegedly violates the liberty interest but "must occur within a reasonable time following [the official action] taking into account the relatively insubstantial private interest at stake and the traditionally broad discretion of prison officials." *Id.* at 476 n.8. The Wardens easily could have believed that the availability to an inmate of the grievance procedures shortly after the suspension of a wife's visitation rights would satisfy any due process requirements of *Hewitt.* There is no allegation that the inmates ever sought to invoke these grievance procedures.

II. PRISON RULES WHICH DO NOT AFFECT THE DURATION, RELEASE, OR THE VERY NATURE OF PRISON CONFINEMENT SHOULD NOT CREATE LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

Since the prison visitation regulation in *Thompson* did not create a liberty interest, it was unnecessary then to express a view on whether this Court should

> adopt a rule that prison regulations, regardless of the mandatory character of their language or the extent to which they limit official discretion, "do not create an entitlement protected by the Due Process Clause when they do not affect the duration or release from confinement, or the very nature of confinement. . . ."

109 S.Ct. at 109 n.3 (quoting brief for petitioners at 10). The *Thompson* petitioners urged that establishing "this bright line would allow prison officials to issue guidelines to prison staff to govern minor decisions, without thereby transforming the details of prison life into 'liberty interests' with accompanying procedural rights. Inasmuch as a 'bright line' of this kind [was] not necessary for a ruling in favor of petitioners," the Court in *Thompson* left "its resolution for another day." *Id.*

Hopefully, that day has come. Petitioners urge the Court to consider now the question whether such a "bright line" for prison administrative rules should be established. There are compelling reasons to do so. Prison officials throughout the states are faced with serious potential for loss of immunity when their decisions implementing day-to-day prison administrative rules fail to recognize, in light of the standards established in *Thompson*, that a general rule may create a liberty interest or that the interaction of various general rules may affect a right under another rule which a district court or court of appeals later determines created a liberty interest.

Prior to *Thompson*, the *Davis* rule protected prison officials from personal liability for rule violations unless the rule violated gave rise to the cause of action. Now since *Thompson*, a violation of any rule on any general subject matter of prison life may cause a warden to lose his immunity if a federal court later determines that the rule created a liberty interest by use of sufficiently explicit mandatory language with a substantive predicate limiting discretion.[3] However, to simply illustrate how difficult this task can be, consider the fact that the court of appeals judges in *Thompson* reached a different conclusion than this Court as to whether the prison visitation rule there created a liberty interest. When the leading jurists in the nation can fairly disagree on whether a prison rule creates a liberty interest, then wardens, who are not judges or even attorneys, are faced with an insurmountable task. In *Davis*, this Court found strong policy reasons why officials should not generally be personally liable for administrative rule violations:

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[3] This prospect contradicts this Court's holdings that federal courts should not become involved in the day-to-day operation of state correctional facilities. *Meachum v. Fano*, 427 U.S. 215, 229 (1976); *Preiser v. Rodriquez*, 411 U.S. 475, 491-92 (1973); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

> Officials would be required not only to know the applicable regulations, but also to understand the intent with which each regulation was adopted. Such an understanding often eludes even trained lawyers with full access to the relevant legislative or administrative materials. It is unfair and impracticable to require such an understanding of public officials generally.

468 U.S. at 196 n.13.

If this Sixth Circuit decision is allowed to stand, wardens would additionally be required to know how the violation of one rule, not creating a liberty interest, could impact on another rule which a court subsequently may find did create a liberty interest. This is not only unfair but essentially an impossible task. As this Court stated in *Davis*, it is not

> [a]lways fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively. See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

Id. at 196.

However, if a warden acts swiftly and does "not err always on the side of caution," he may become personally liable for violation of a general rule not involving the very nature of confinement which later is determined to have created a liberty interest. Faced with this impossible task, a "bright line" needs to be established that liberty interests may only be created by prison rules relating to the nature of confinement. This Court's prior decisions have found the existence of liberty interests only when the prison rule involved the duration of, or release from confinement, or that the very nature of confinement was somehow dramatically altered.[4] Since visitation rules and other general rules of prison management do not involve the duration of or release from confinement, no due process right would be implicated in this case if such a "bright line" were established.

Incarceration necessarily restricts an inmate's liberty and such restrictions of liberty are within the overall limitations to be expected in a penal institution unless the conditions are "cruel and unusual" or unjustifiably interfere with substantive rights. *Rhodes v. Chapman*, 452 U.S. 337 (1981). An inmate has no constitutional right to meet with any visitor of his choice. Neither do prison visitors have a fundamental right to visit specific inmates. *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bellamy v. Bradley*, 729 F.2d 416 (6th

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[4] E.g., *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Vitek v. Jones*, 445 U.S. 480 (1980); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Wolff v. McDonnell*, 618 U.S. 539 (1974). This Court's decisions have not found that rules involving day-to-day prison operation create liberty interests. *Compare, Olim v. Wakinekona*, 461 U.S. 238 (1983) (no liberty interest in interstate transfer); *Meachum v. Fano*, 427 U.S. 215 (1976) (no liberty interest in intrastate transfer). *Hewitt v. Helms, supra*, is perhaps the closest exception but even there the nature of confinement was dramatically altered.

Cir.), *cert. denied*, 489 U.S. 469 (1984). For instance, as this Court explained in *Jones*:

> In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, *supra* at 822. Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a "mutual accommodation between institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," *Wolff v. McDonnell*, 418 U.S., at 556, this Court has repeatedly recognized the need for major restrictions on a prisoner's rights.

433 U.S. at 129.

This necessarily expected withdrawal and limitation of an inmate's liberty and privileges has previously caused this Court in *Hewitt* to express its concern over the expansion of liberty interests created by prison rules into the general areas of prison life:

> We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking." *Wolff v. McDonnell*, *supra*, at 566 . . ., and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano*, *supra*, at 225.

> . . . As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 344 US 266, 285 . . . . As we have held previously, these decisions require that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Montanye v. Haymes*, 427 US 236, 242 . . . .

459 U.S. at 467-68.

In *Hewitt*, a prison regulation, regarding restrictive confinement of a prisoner who was disciplined for engaging in a riot causing serious injury to prison guards, was found to create a liberty interest. Even then, the nature of confinement was altered. However, this Court stated there were "persuasive reasons why we should be loath to transpose all of the reasoning in the cases just cited" to create a liberty interest in "the situation where the statute and regulations govern the day-to-day administration of a prison system." *Id.* at 470. The Court was loath to do so because "the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials," and the "deprivations imposed in the course of the daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good time credits." *Id.* This Court stated that "[t]hese facts suggest '*that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas.*'" *Id.* (emphasis added).

The Court should now consider this important question and decide whether lawful incarceration warrants the establishment of a "bright line" beyond which prison regulations should not create liberty interests protected by the Due Process Clause unless the rules involve the duration of, release from, or the very nature of confinement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89-5377/5378/5379

MARIAM LONG, CURTIS LONG, ANITA SIMMERS, JAMES MARLIN HODGES, KAREN MILLS, and RONNIE S. MILLS,
Plaintiffs-Appellees.

v.

STEVEN NORRIS, Individually and as Commissioner of the Tennessee Department of Corrections; LINDA ROBERTS; SAM CHAPMAN; LISA MARSHALL; IRENE LADD; JAMES WORTHINGTON; CHARLES JONES; RUBY SPAKES; GLADYS NOE; CHARLENE SMITH; BARBARA WRIGHT; KATHY HILL; LINDA SHIPWASH; TOM MAYS; DALE ROBERTS EVANS; ANGIE THOMAS; CHARLES BROWN; SHEENA WARD; TERESA (LAST NAME UNKNOWN); and JACKIE CORNELL,
Defendants,

OTIE JONES, Individually and as Warden of the Morgan County Regional Correctional Facility; M. C. HAMBY, Associate Warden,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Tennessee

Decided and Filed April 3, 1991

Before: MARTIN and BOGGS, Circuit Judges; and HACKETT, District Judge.*

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* The Honorable Barbara K. Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

MARTIN, Circuit Judge, delivered the opinion of the court, in which HACKETT, District Judge, joined. BOGGS, Circuit Judge, (p. 14), delivered a separate opinion concurring in part and dissenting in part.

BOYCE F. MARTIN, JR., Circuit Judge. Defendants-appellants are the warden and associate warden of the Morgan County (Tennessee) Regional Correctional Facility. The wardens filed this interlocutory appeal in these consolidated civil rights actions brought under 42 U.S.C. § 1983. Each of the three consolidated cases has two plaintiffs, one of whom was an inmate at the Morgan County prison during the relevant time period and one of whom was the inmate's spouse or fiancee who visited the inmate during the relevant time period. The plaintiffs claim that their constitutional rights were violated by strip and body cavity searches of the visitor plaintiffs—conducted without probable cause by prison guards—and by the searches' effect of chilling the inmate plaintiffs' rights to visitation. On appeal, the wardens argue that the district court erred in denying their motion for dismissal or summary judgment on the basis of their asserted qualified immunity.[1] We affirm in part and reverse in part.

The wardens authorized at least two strip searches or body cavity searches of each of the visting plaintiffs during 1984 and 1985. Prison guards told the visiting plaintiffs that they would not be allowed to visit their husbands or fiancees unless the visiting plaintiffs submitted to the searches. Plaintiff Mariam Long's visitation rights were suspended for sixty days because she refused to undergo a manual body cavity search. None of the

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[1] The wardens also sought review of the district court's grant of plaintiffs' motions to compel discovery and for attorney's fees resulting from the wardens' failure to cooperate with discovery. We dismissed these issues under 28 U.S.C. § 1292 as unappealable without a final decision in an order entered on October 12, 1989.

searches revealed any contraband or any other evidence of criminal conduct.

The plaintiffs filed separate complaints in this now-consolidated lawsuit during December 1985. They alleged that the searches violated the visting plaintiffs' fourth amendment rights to freedom from unreasonable searches and seizures. The inmate plaintiffs also alleged that the wardens violated the inmate plaintiffs' fourteenth amendment liberty interest in visitation, created by Tennessee prison regulations. Tennessee prison regulations state that inmates "shall" have visitation rights, Tenn. Dep't. of Corrections Policy No. 501.01, V.B., and that visitation rights may be suspended only for "good cause," *id.* at No. 507.01, VI, Procedures § E(5). Tennessee prison regulations require that a prison official have probable cause to believe that a prison visitor is concealing contraband before the official may authorize a strip search or a visual or manual body cavity search of the prison visitor. *Id.* at No. 506.06, V.B.[2] The plaintiffs' final allegation was that the searches violated their first amendment right to freedom of association.

On January 6, 1988, the wardens moved for dismissal or summary judgment on the basis of qualified immunity. The wardens admitted that they authorized the searches without probable cause in violation of Tennessee prison regulations. The wardens averred that they had a reasonable suspicion that the plaintiffs were smuggling contraband, based on confidential information from unnamed "reliable informants." The wardens contended that by

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[2] This policy states in full:

> Strip, visual body cavity and/or manual body cavity searches of the persons of visitors and employees may only be conducted when they are specifically authorized regarding a particular person and shall only be authorized when there is *probable cause* to believe the person is concealing contraband.

Tenn. Dep't. of Corrections Policy No. 506.06. V.B. (emphasis added).

acting on their suspicion, they did not violate clearly established constitutional law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The district court rejected this contention and denied the wardens' motion to dismiss on February 15, 1989.

Although appellate courts usually lack jurisdiction to hear appeals of denials of motions for summary judgment, the denial of motions for summary judgment asserting qualified official immunity falls within an exception to this general rule. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Huron Valley Hospital v. City of Pontiac*, 792 F.2d 563, 566-67 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986).[3] Interlocutory appeal of the denial of summary judgment motions asserting qualified immunity is warranted because qualified immunity is not merely a defense to a law suit—it is an "entitlement" not to be sued at all. *Mitchell*, 472 U.S. at 525-27; *Huron Valley*, 792 F.2d at 567. Qualified immunity engages so early because liability is not the sole public danger of law suits against public officials. The threat of liability and necessary attention to pretrial matters, such as discovery, distract public officials from effectively performing their government functions and discourage able persons from entering public service. *Mitchell*, 472 F.2d at 526; *Harlow v. Fitzgerald*, 457 U.S. at 816-17. Interlocutory appeal is appropriate because the entitlement not to be sued is "lost forever" if an immune public official is required to litigate the case all the way to trial. *Huron Valley*, 792 F.2d at 567.

Application of qualified immunity to a particular defendant is a question of law. *Garvie v. Jackson*, 845 F.2d 647, 649 (6th Cir. 1988). As such, our review is *de novo*. The standard for qualified immunity is that

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[3] Although *Mitchell* was a constitutional tort action against a federal official, a suit against a state official under section 1983 is treated the same for purposes of qualified immunity. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978).

government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. The parties do not dispute that the plaintiffs seek civil damages, or that the wardens' actions in approving searches based on an alleged reasonable suspicion constitute "discretionary functions" under *Harlow*.

Thus, we venture once more into the labyrinth of deciding what makes a right "clearly established" for purposes of qualified immunity. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that qualified immunity protected a former United States Attorney General from suit for authorizing a warrantless wiretap in a matter involving domestic security. Immunity applied because the unconstitutionality of warrantless wiretaps was not clearly established at the time of the Attorney General's wiretap authorization in November 1970. Two years after Attorney General Mitchell's authorization of the wiretap, the Supreme Court declared such wiretaps unconstitutional in *United States v. United States District Court*, 407 U.S. 297 (1972) (holding warrantless wiretaps involving domestic threats to national security unconstitutional). In *Mitchell*, the Court stated that the constitutional right prohibiting warrantless wiretaps was not clearly established if there remained a "legitimate question whether an exception to the warrant requirement exists." 472 U.S. at 533. A "legitimate question" obviously existed in *Mitchell* because at the time Attorney General Mitchell authorized the warrantless wiretap, some district courts had approved warrantless wiretaps in cases of domestic security. *Id.* (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972) (the "Chicago 7" case)

and *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *appeal dismissed*, 453 F.2d 344 (10th Cir. 1972)); *see Dominique v. Telb*, 831 F.2d 673 (6th Cir. 1987) (the question in *Mitchell* regarding the clear establishment of a constitutional right was "not a particularly difficult one"). As a result, the Court did not delve in detail into when an official would have a "legitimate question" as to the constitutionality of his or her action. However, the Court stated that a previous case with "identical circumstances was not needed to find that a law was clearly established." *Id.* at 535 n.12.

In *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), the Court provided more guidance on the "legitimate question" issue and held that in order for a constitutional right to be clearly established, the law must be clear in regard to the official's particular actions in the particular situation. The Court stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that it light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted). The Court in *Anderson* recognized that qualified immunity is not overcome merely by general allegations that a clearly established constitutional right has been violated. Rather, the particular conduct of the responsible official must fall clearly within the area protected by the constitutional right, such that a reasonable official would know that his or her conduct violated the constitutional right. 483 U.S. at 640-41. It was on this ground that the Court in *Anderson* found that the court of appeals had erred in denying qualified immunity. *Id.* at 641. The Court emphasized that a fact-

specific analysis would maintain "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Id.* at 639. The Court sought to avoid "making it impossible for officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

We use an "objective reasonableness" standard to determine whether an official could reasonably anticipate that a constitutional right is clearly established. *Harlow v. Fitzgerald*, 457 U.S. at 818; *Masters v. Crouch*, 872 F.2d 1248, 1251 (6th Cir.) (Lively, J.), *cert. denied sub nom. Frey v. Masters*, —— U.S. ——, 110 S. Ct. 503 (1989). As applied in *Anderson v. Creighton*, the objective reasonableness test focuses on whether an official, given the facts that the official knew or reasonably should have known about the situation, should have known that his or her particular conduct would not pass scrutiny when applied to the law. 483 U.S. at 641; *Wood v. Ostrander*, 851 F.2d 1212, 1218 (9th Cir. 1988) ("The immunity standard considers whether a reasonable [official] should view the [previous case law] as controlling."). Public officials are expected to be aware of the state of clearly established law governing their conduct. The Eighth Circuit has stated that "state employees may not rely on their ignorance or even the most esoteric aspects of the law to deny individuals their due process rights." *Wentz v. Klecker*, 721 F.2d 244 (8th Cir. 1983). In determining whether a constitutional right is clearly established in a given situation, we "look first to the decisions of the Supreme Court, then to decisions of this court and other courts within this circuit, and finally to decisions of other circuits." *Crouch*, 872 F.2d at 1251-52 (citations omitted). With these general official immunity principles in mind, we turn to the specific allegations of unconstitutional activity in this case.

I. *Search and Seizure Rights*

Plaintiffs allege that qualified immunity does not apply because the wardens violated the prison visitors' clearly established fourth amendment right to be free from strip and body cavity searches absent probable cause. To show the existence of a clearly established fourth amendment right, plaintiffs rely on precedents of other circuits and Tennessee prison regulations requiring probable cause for a strip search of a prison visitor. We note that although Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment.

We need not define in this case precisely what level of individualized suspicion is required in the context of prison visitor searches. The question before the court is not whether the proper standard should be reasonable suspicion or should rise to the level of probable cause, but whether a constitutional right to be free from strip and body cavity search absent probable cause was clearly established at the time of the searches for purposes of qualified immunity. We hold that such a right was not established.

In the Sixth Circuit, we have not stated what level of fourth amendment protection is clearly established in the context of prison visitor searches. In *Ohio Civil Service Employees Ass'n. v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988), the Court held that the level of protection against strip and body searches afforded to prison employees was not clearly established. In dicta, the Court discussed the precedents from other circuits holding that strip searches of prison visitors without a "reasonable suspicion" could violate the fourth amendment. *See, e.g., Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Thorne*

v. Jones, 765 F.2d 1270 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). The *Seiter* Court distinguished the reasoning for cases involving searches of prison visitors from cases, like the one before it, involving strip searches of prison employees. 858 F.2d at 1176-77. The Court held that the state had a higher interest in searching prison employees than in searching prison visitors. *Id.* at 1177. The Court noted that prison employees had access to more sensitive areas of the prison than did visitors and that prison employees spent more time in the prison than did visitors. *Id.* In addition, the Court stated that prison employees had less of a privacy interest than did prison visitors because the employees had volunteered to work in a security environment. *Id.*

Unlike searches of prison employees, searches of prison visitors during 1984 and 1985 without at least a reasonable suspicion violated clearly established law, because a reasonable officer should have known that such searches would be found unconstitutional. As noted by the court in *Seiter*, while prison visitors volunteer to visit the prison, they probably do not choose to incarcerate their friends or family members. *Id.* The prison visitors' situation is analogous to that of air travellers going through airport security. Although they volunteer to board the airplane, they do not lose their right not to be subjected to something so invasive as a strip or body cavity search without so much as a hint of suspicion. *See Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (strip searches are inevitably "embarrassing and humiliating"). However, the plaintiffs have not alleged that this clearly established fourth amendment right was violated. The plaintiffs have alleged only that the wardens lacked *probable cause* for their searches, not that the wardens lacked reasonable suspicion. The asserted right of prison visitors to be free from strip and body cavity searches without probable cause was not clearly established undeh the fourth amendment. Consequently, the

plaintiffs have failed to plead a cause of action under the fourth amendment that can overcome the wardens' assertion of qualified immunity.

II. *Liberty Interest*

Tennessee prison regulations give inmates liberty interest in prison visitation under the fourteenth amendment to the federal Constitution, which the wardens have clearly violated according to plaintiffs' allegations. As we have stated, "The Supreme Court has determined that violation of a clearly established state regulation is sufficient to cause officials to forfeit their qualified immunity" for claims of deprivation of federal constitutional guarantees. *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *See Davis v. Scherer*, 468 U.S. 183 (1984). In *Spruytte*, we found that a state regulation, which allowed inmates to receive books that did not threaten security, created a constitutionally protected property or liberty interest. Because the state regulation was clearly established, the panel in *Spruytte* held that prison officials were not entitled to qualified immunity where they refused to allow an inmate to receive a paperback dictionary from his mother.

Even before *Spruytte*, we recognized that other Tennessee prison regulations created liberty entitlements for inmates under the fourteenth amendment to the federal Constitution. *Bills v. Henderson*, 631 F.2d 1287, 1294 (6th Cir. 1980). In *Bills*, Tennessee prison inmates challenged prison officials' use of administrative segregation in violation of Tennessee prison regulations. We held that a state prison policy statement created a federal constitutionally protected liberty interest if it limited the discretion of prison officials. *Id.* at 1293-94. We also found that official discretion was limited enough to create a protected liberty interest by regulations, which merely stated the purposes of administrative segregation. *Id.* at 1294.

In *Kentucky Dep't. of Corrections v. Thompson*, 57 U.S.L.W. 4531, 109 S. Ct. 1904, 104 L.Ed.2d 506 (1989), the Court held that state prison regulations must be couched in mandatory language in order to establish a liberty interest with federal constitutional due process protection. The Court held that the Kentucky regulations at issue in *Thompson* were not sufficiently mandatory to invoke a property interest. The Kentucky regulations merely stated, "It is the policy of the Kentucky state reformatory to respect the right of inmates to have visits in the spirit of the court decisions and the consent decree, while ensuring the safety and security of the institution." In stark contrast, the Tennessee prison regulations clearly state in mandatory terms that a strip search can not take place without probable cause. Tenn. Dep't. of Correction Policy No. 506.06, V.B. The same regulations explicitly define probable cause as "more than mere suspicion." *Id.* at No. 506.06, IV.I.

Tennessee prison regulations establish the inmates' fourteenth amendment liberty interest in visitation under the reasoning in both *Bills*, 631 F.2d 1287, and the later, stricter requirements of *Thompson*, 57 U.S.L.W. 4531.[4] The Tennessee prison regulations state that inmates "shall" have visitation rights and that visits "shall be limited only by the institution's space and personnel resources." *Id.* at No. 507.01, V.B. The Tennessee prison regulations require the warden to establish a visitation

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[4] Although *Thompson* was not decided until 1989, applying it here does not violate the rule that public officials are accountable only for laws that were clearly established at the time of their actions. *Washington v. Starke*, 855 F.2d 346, 348 (6th Cir. 1988). The Court's decision in *Thompson* reflected the state of clearly established law in 1985—the time of the visitation in that case. The searches in this case occurred during that same period. Thus, *Thompson* is good precedent concerning the state of the fourteenth amendment during the relevant time in this case. In any event, if *Thompson* did not apply, we would analyze this issue under the less stringent requirements set forth in *Bills*.

schedule "which includes at least the hours of one evening per week, Saturdays, Sundays, and state holidays." Tenn. Dep't. of Corrections Policy No. 507.01, VI.C.[5] In addition, the Tennessee regulations allow visitation rights to be suspended only upon a showing of "good cause," Tenn. Dep't. of Corrections Policy No. 507.01, VI, Procedures, § E(5); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause'"). Because the plaintiffs' visitation rights were mandatory and could not be removed without good cause under the Tennessee prison regulations, they were liberty entitlements under the fourteenth amendment. Threats to remove this visitation right, in retaliation for the visitors' refusal to submit to an illegal strip search, violated clearly established law. Thus, qualified immunity does not bar plaintiffs' action for this alleged constitutional deprivation.

The wardens rely on *Washington v. Starke*, 855 F.2d 346 (6th Cir. 1988), to argue that an intra-departmental regulation cannot provide a basis for denying qualified immunity. This argument misconstrues *Starke*. *Starke* concerned a single police department, as opposed to a state-wide prison system. Thus, *Starke* does not alter either the Supreme Court's decision in *Thompson* or our decisions in *Bills* and *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989).

Once a constitutional liberty interest is clearly established, prison officials may violate that interest only if they meet the fundamental requirements of due process—notice and an opportunity to be heard. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Plaintiffs have

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[5] The imprecise language regarding the visitation schedule presumably allows inmates to have one visitation night during the normal workweek and additional visitation on weekends and state holidays.

alleged that they were not afforded any process at all. The district court properly denied the wardens' claim of qualified immunity in regard to the plaintiffs' claims of deprivation of liberty without due process under the fourteenth amendment.

III. *Freedom of Association Rights*

The district court also held that plaintiffs' first amendment rights of free association were violated by the wardens' refusal, without probable cause, to allow visiting plaintiffs to visit the inmate plaintiffs unless the visitors submitted to a strip or body cavity search. A prison inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Although the complaints are not clear and the briefs do not address this issue, plaintiffs apparently allege that the searches violated the plaintiffs' freedom of association by discouraging visits to the inmates. Plaintiffs do not allege any intent to discourage association, either for its own sake or as retaliation for any actions by the inmates in prison. In the Sixth Circuit, we have not decided the degree to which prison inmates retain their freedom of association. The Fifth Circuit has held that prison inmates have no first amendment right "to simple physical association." *Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985). Given the sparse authority on this issue, we hold that any such right, if it exists, is not clearly established. Consequently, we reverse the district court's ruling on this issue.

For the above stated reasons, we reverse the judgment of the district court insofar as we find that qualified immunity should be granted to the wardens in regard to the plaintiffs' claims under the fourth and first amendments, and we affirm the district court's judgment denying the wardens' qualified immunity against claims alleg-

ing violations of the due process clause of the fourteenth amendment.

BOGGS, Circuit Judge, concurring in part and dissenting in part. If we are to deny qualified immunity to these prison officials based on their violation, not of the Constitution directly, but of state administrative regulations, we must find that, in 1985, all reasonable prison officials would have known that they could be personally liable for money damages if they violated a prison regulation of their own state. *McIntosh v. Weinberger*, 810 F.2d 1411, 1433 n. 9 (8th Cir. 1987); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

I do not think that the state of the case law permits that conclusion. The best case for that proposition is *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012 (1984). Although that case is not a model of clarity, footnote 12 (468 U.S. at 194, 104 S. Ct. at 3019) while clearly discounting mere violation of a regulation as the basis for any kind of liability, seems to say that a section 1983 suit sometimes can be based on a violation of a regulation that furnishes the gravamen of the action sued on, though at other times it speaks of liability "only to the extent that there is a clear violation of the *statutory* rights . . . ." (emphasis added). Although the violation of the regulation led directly to and authorized the strip search that is the injury complained of, I do not think all reasonable officials would understand from *Davis* that they were now liable in damages for every violation of regulations. Similarly, *Hewitt v. Helms*, 459 U.S. 460, 103 S. Ct. 864 (1983), which holds that a prison regulation can be the basis for a liberty interest protected by section 1983, was not a money damages case and does not allude to that possibility.

I therefore respectfully dissent from that portion of the opinion that refuses to allow qualified immunity from suit based on violation of the prison regulation.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Civ. No. 3-86-482

ANITA SIMMERS and JAMES HODGES,
Plaintiffs,

v.

JEFF REYNOLDS, *et al.*,
Defendants.

Civ. No. 3-86-516

MARIAM LONG and CURTIS LONG,
Plaintiffs,

v.

JEFF REYNOLDS, *et al.*,
Defendants.

Civ. No. 3-86-532

KAREN MILLS and RONNIE S. MILLS,
Plaintiffs,

v.

JEFF REYNOLDS, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Feb. 15, 1989]

Defendants have filed motions to dismiss, for summary judgment, and for judgment on the pleadings. Defendants' motions will be addressed in the order in which they were filed with the Court.

The motion for summary judgment and for judgment on the pleadings was filed on January 6, 1989, and will be addressed first.

Defendants Otie Jones and M. C. Hamby raise the issue of qualified immunity and state that they are entitled to be dismissed from this action because the law at the time plaintiffs were searched was not clearly established. Plaintiffs contend, and this Court agrees, that the law regarding plaintiffs' right to be free from unreasonable searches and the law regarding plaintiffs' First Amendment rights, was clearly established at the time the plaintiffs in this action were searched.

In regard to the right of prison visitors to be free from unreasonable searches, prior case law,[1] in conjunction with Tennessee Department of Correction policy [2] and numerous Supreme Court decisions regarding the concept of probable cause,[3] clearly establish that before searches

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[1] *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982). [Two other opinions, *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985) and *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985) are in accord with *Hunter*.]

[2] TDOC Policy No. 506.06, (effective February 1, 1982).

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509,

of prison visitors may be authorized, probable cause or reasonable suspicion must be determined to exist.

The fact that Tennessee Department of Correction (TDOC) policy, as recognized in 1982, some three years prior to the searches in these cases, required "probable cause" for "strip, visual body cavity and/or manual body cavity searches of the persons of visitors" is a clear indication that the visitor's right was clearly recognized and, indeed, established by policy. As the Sixth Circuit Court of Appeals stated in *Spruytte v. Walters*, "The Supreme Court has determined that violation of a clearly established state regulation is sufficient to cause officials to forfeit their qualified immunity." *Spruytte v. Walters*, 753 F.2d 498, 510 (6th Cir. 1985) (*citing Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). There is no question that defendants Hamby and Jones received training by TDOC regarding searches and knew that they had to have probable cause or reasonable suspicion to authorize searches of visitors.

In addition, due to the fact that the United States Supreme Court has issued numerous decisions on the issue of probable cause, the defendants should have had some basic concept of how the courts determine probable cause. Moreover, the requests for admissions, deemed admitted by this Court on January 31, 1989, admit the fact that defendants Jones and Hamby did not have any oral communication from a reliable source giving probable cause for most of the searches of the plaintiffs.

The Court also notes that the Eighth Circuit Court of Appeals had decided this issue prior to the instant searches. *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982).

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12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). (This list is not exhaustive of the Supreme Court cases which have addressed the issue of probable cause.)

Other courts, as previously noted, have followed the *Hunter* decision. This Court adopted the *Hunter* standard with respect to Fourth Amendment searches of prison visitors in these cases on April 21, 1988.

There is no doubt, from the authorities and policies cited above, that the law was clearly established at the time of these searches that probable cause to search prison visitors must be based on more than unreliable information or anonymous tipsters. Accordingly, defendants Jones and Hamby are not entitled to qualified immunity. Defendants Jones' and Hamby's motion for summary judgment and for judgment on the pleadings in regard to unreasonable searches is DENIED.

This Court is also of the opinion that plaintiffs' First Amendment rights were clearly established at the time of the cause of action. As recognized by an order of this Court on April 21, 1988, TDOC Policy No. 507.01, as recognized in 1982, created a liberty interest in visitation. Of course, once a liberty interest has been created, some form of due process is required before an individual can be deprived of that interest. *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), *citing Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974). Following the dictates of *Pell v. Procunier*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1980), *Bills v. Henderson*, 631 F.2d 1287 (6th Cir. 1980), and *Walker v. Hughes*, 558 F.2d 1247 (6th Cir. 1977), plaintiffs' First Amendment rights were clearly established when the actions occurred in these cases. Accordingly, defendants Jones and Hamby are not entitled to qualified immunity on this issue and their motion for summary judgment and judgment on the pleadings is DENIED.

In addition to the above, this Court agrees with the plaintiffs that dismissal of declaratory relief claims

against defendant Jones and Hamby, and injunctive relief claims against defendant Jones is not appropriate. Because defendant Hamby is no longer an employee of the TDOC, injunctive relief claims against him are DISMISSED.

Defendants May, Evans, Hill, Chapman, Thomas, Walls, Roberts, Christmas, Wright, Ladd, Marshall, and Spakes have filed a motion to dismiss or in the alternative for summary judgment stating that they are entitled to qualified immunity and, in any event, were not the proximate cause of the plaintiffs' injuries. Defendants assert that the "law of qualified immunity has greatly expanded from the early Supreme Court cases applying it to high level federal government administrators such as in *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982)." (Defendants' Brief at 29.) This Court disagrees. There has been no expansion of the qualified immunity defense to individuals performing only ministerial duties. Clearly, the defendants listed above were only performing ministerial duties. Accordingly, they are not entitled to qualified immunity and their motion on this ground is DENIED.

The Court is of the opinion, however, that the movants listed above should be dismissed from this action. The Court sees no reason why these defendants would be required to question the constitutionality of the warden's determination of probable cause or the constitutionality of the plaintiffs' consent. These defendants merely did what they were told to do by their superiors and clearly, based upon the entire record in this case, did not violate any constitutional right of plaintiffs. *See, Palmer v. Schneider*, 699 F.2d 322 (6th Cir. 1983) (The Court stated, "the Sheriff simply obeyed orders of his superiors. He did nothing wrong.")

The execution of the searches was not unconstitutional unless the defendants had some reason to know that the searches were being conducted without probable cause. These defendants had no reason to question the probable cause determination of their superiors or whether such determination was based upon reliable information.

This Court also finds that the defendants' situation is analogous to law enforcement officers' actions in executing a facially valid search warrant that was obtained by making negligent statements or omissions of fact to the issuing magistrate. Such officers are not liable under 42 U.S.C. Section 1983. *See, Donta v. Hooper*, 774 F.2d 716 (6th Cir. 1985). These defendants, carrying out the orders of their superiors, are not liable in this circumstance.

Accordingly, defendants May, Evans, Hill, Chapman, Thomas, Walls, Roberts, Christmas, Wright, Ladd, Marshall, and Spakes' motion for summary judgment is GRANTED and they are hereby DISMISSED.

ENTER:

/s/ James H. Jarvis
JAMES H. JARVIS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-5377/78/79

MARIAM LONG; CURTIS LONG,
Plaintiffs-Appellees

v.

STEVEN NORRIS, Individually and as Commissioner of the Tennessee Department of Corrections; LINDA ROBERTS; SAM CHAPMAN; LISA MARSHALL; IRENE LADD; JAMES WORTHINGTON; CHARLES JONES,
Defendants

OTIE JONES, Individually and as Warden of the Morgan County Regional Correctional Facility; M. C. HAMBY,
Defendants-Appellants

[Filed Apr. 29, 1991]

Before: MARTIN and BOGGS, Circuit Judges; HACKETT, District Judge.*

Upon consideration of the petition for rehearing submitted by the appellees',

It is ORDERED that the petition be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* The Honorable Barbara K. Hackett, District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 89-5377: 89-5378: 89-5379

MARIAM LONG; CURTIS LONG, ANITA SIMMERS, JAMES MARLIN HODGES, KAREN MILLS, and RONNIE S. MILLS,
Plaintiffs-Appellees

v.

STEVEN NORRIS, *et al.*,
Defendants

OTIE JONES, Individually and as Warden of the Morgan County Regional Correction Facility; M. C. HAMBY, Associate Warden
Defendants-Appellants

Before: Martin, and Boggs, Circuit Judges; Hackett, District Judge

JUDGMENT

[Filed Apr. 3, 1991]

On Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville

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THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed in part and affirmed in part.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Issued as Mandate:
May 20, 1991

A True Copy.

Attest:

COSTS:	None
Filing Fee	$
Printing	$
Total	$

/s/ [Illegible]
Deputy Clerk

STATE OF TENNESSEE
DEPARTMENT OF CORRECTIONS

MORGAN COUNTY
REGIONAL CORRECTIONAL FACILITY

POLICIES AND PROCEDURES

Approved by: /s/ Illegible

Subject: MANUAL BODY CAVITY SEARCHES

ACA STD 2-4193

Index 113-13-1

Effective Date: 08-24-81

Supersedes: N/A

PURPOSE: To establish written policy for defining the principles, purposes and procedures in manual body cavity searches of Employees and Visitors.

APPLICATION: All Inmates, Visitors and Employees of this Institution.

DEFINITIONS: A Manual Body Cavity Search is an inspection of the orifices (ears, nose, mouth, vagina, anus), particularly vaginal or anal, utilizing instruments and/or fingers.

POLICY: It will be the policy of the Morgan County Regional Correctional Facility that a Manual Body Cavity Search will be conducted according to the procedures outlined in this policy.

PROCEDURE:

1. A Manual Body Cavity Search is to be performed only by a physician or licensed nurse in the treatment room.

2. A Manual Body Cavity Search will be done only with the permission of the Warden or Acting Warden. Such permission shall be obtained from the Warden or Acting Warden by the Senior Correctional Officer on duty prior to the performance of such a search.

3. A Correctional Officer of the same gender must be present during the search.

4. Written consent must be obtained prior to search by the licensed nurse if the search is being done on an Employee or Visitor.

5. A report of the Body Cavity Search or the refusal to allow the search must be written immediately on an Incident Report. Copies must be submitted to the following locations:

    a. Clinic Body Cavity Search File

    b. Senior Correctional Officer on duty

    c. Medical file if performed on a Resident

6. Contraband items found during the Body Cavity Search will be turned over to the Senior Correctional Officer on duty.

7. The Manual Body Cavity Search will be performed using correct nursing technique and in a professional manner preserving the privacy of the individual being searched.

ADMINISTRATIVE POLICIES AND PROCEDURES

State of Tennessee
Department of Correction

[SEAL]

Approved by: /s/ H.B. Bradley

Subject: SEARCHES

Index #506.06

Effective Date: February 1, 1982

Distribution: B

Supersedes: N/A

I certify that this is a true and exact copy of the original document.

I. *AUTHORITY*: TCA 4-3-603, TCA 4-3-606.

II. *PURPOSE*: To standardize approved methods for Department of Correction (TDOC) staff to search visitors, employees, inmates, inmate housing units and other areas of the facility.

III. *APPLICATION*: To the employees and inmates of correctional facilities.

IV. *DEFINITIONS*:

A. *Frisk Search*: A search in which an individual is not required to remove his/her clothing

B. *Strip Search*: A search for which an individual is required to remove his/her clothing

C. *Visual Body Cavity Search*: The visual inspection of the body cavities without touching the recipient either personally or with instruments

D. *Manual Body Cavity Search*: A manual inspection of mouth, ear, nose, anal and vaginal body cavity performed only by authorized medical or nursing staff utilizing the fingers or appropriate instruments

E. *Room or Area Search*: A thorough inspection of a housing unit, a cell or room or any other area of all items and furniture therein

F. *Contraband*: Any item which is not permitted or is expressly prohibited by TDOC or institutional policy

G. *Visitors*: Persons other than TDOC employees or inmates who seek to enter the gates or grounds of the institution

H. *Employees*: All workers, civil service or non-civil service, on the staff or payroll of any division, institution or office of the TDOC

I. *Probable Cause*: A belief, based on information which is more than mere suspicion, that an allegation is likely true; a level of proof which lend good cause to the taking of an action.

V. *Policy*:

A. Frequent unannounced searches of visitors, employees, inmates, inmate's quarters and other areas of the facility shall be conducted as often as necessary to ensure the safety and security of the facility. Searches are conducted to detect and prevent the introduction of contraband, to recover missing or stolen property and to prevent escapes and other disturbances. Searches shall be conducted in a manner which will

avoid unnecessary force, embarrassment or indignity to those whose person and/or belongings are being searched.

B. Strip, visual body cavity and/or manual body cavity searches of the persons of visitors and employees may only be conducted when they are specifically authorized regarding a particular person and shall only be authorized when there is probable cause to believe the person is concealing contraband.

C. Strip and visual body cavity searches of inmates, visitors and employees shall be conducted only by security staff of the same gender as the subject, under santitary conditions and in privacy.

D. Manual body cavity searches of any person shall be conducted only by medical or nursing staff. They must be held in sanitary conditions and in privacy. (See Policy # 113.78)

E. Strip, visual body cavity and manual body cavity searches of visitors or employees require that the authorizer of the search complete Form # CR-2156 and forward it to the Associate Warden of Security for filing.

F. Manual body cavity searches of inmates require that the authorizer of the search complete Form # CR-2156 and forward it to the Associate Warden of Security for filing.

G. Searches are purposeful

1. To prevent the introduction of weapons or other contraband into the institution
2. To detect the manufacture of weapons, escape devices, etc., within the institution
3. To discover and suppress trafficking between employees and inmates

4. To enforce rules designed to eliminate the causes of controversy and strife between inmates
5. To discourage theft and prohibited trafficking in goods and items.
6. To check malicious waste or destruction of institutional property
7. To discover hazards to health or safety which may go unnoticed during a more routine inspection.

VI. *PROCEDURES*:

A. *Searching Visitors*

1. Frisk searches routinely may be conducted by security staff, as specified by the Warden.
2. Strip searches and visual body cavity searches may only be authorized by an officer of the rank of Correctional Officer 2, the equivalent or above.
3. Manual body cavity searches may only be authorized by the Warden or ranking security staff in charge of the institution.
4. Any visitor who refuses to submit to a personal search of any type shall be denied admittance and ordered to leave state property.
   a. The Warden may thereafter consider suspension of visitation privileges. (See Policy #507.01)
   b. A written memorandum detailing the visitor's refusal shall be prepared by the staff member involved and forwarded to the Associate Warden of Security.

B. *Searching Employees*

1. No forcible searches shall be conducted.

2. Frisk searches may be conducted routinely by security staff as specified by the Warden.

3. Strip, visual body cavity and manual body cavity searches may only be authorized by the Commissioner, his/her designee, or the Warden.

4. Auy employee who refuses to submit to a personal search shall be subject disciplinary action.

5. If an employee refuses to submit to a personal search and there is probable cause to believe that the employee may be concealing contraband, the Commissioner, designee or the Warden may authorize that the employee be held pending notification and arrival of law enforcement authorities.

C. *Searching Inmates*

1. Frisk searches shall be routinely conducted by security staff at times and in places specified by the Warden.

2. Strip searches and visual body cavity searches may only be authorized by a Correctional Officer 2 or higher rank. They shall be conducted only for purposes and under circumstances specified by institutional policy promulgated by the Warden.

3. Manual body searches may only be authorized by the Warden or ranking security staff in charge of the institution.

4. Inmates refusing a personal search of any type shall be charged with a disciplinary infraction of Refusing a Direct Order. They may be forcibly searched upon orders of the

Warden or ranking security staff. Forcible manual body cavity searches shall be conducted only in compliance with Policy #113.78.

D. *Searches of Personal Property*

1. Any items in the immediate possession of an inmate, visitor or employee at the time they are subjected to a search of any type also shall be searched.

   a. Written documents should be sorted to detect contraband, but shall not be read.

   b. A visitor or employee's wallet or purse containing money shall not be handled by the searcher but shall be opened completely and its contents displayed by the owner.

2. Vehicles owned or driven by visitors or employees shall be searched as authorized by the Warden or ranking security staff person in charge of the institution. If the owner refuses to have the vehicle searched, the matter shall be handled as it would be if he/she refused a personal search.

3. Searches of housing units and cells or rooms shall be performed at unannounced and irregular times but on a routine schedule. They are necessary for the safety and security of the institution, therefore a pattern of searching must be carefully avoided. This type of search must be conducted in an orderly manner to be thorough. Two officers shall be present during this type of search.

   a. After a search, a room should be left as was found, never in disorder. Inmate personal property shall be respected and

shall not be willfully discarded, broken or misplaced. The mark of a good inspecting officer is the ability to make a complete search and yet leave the room as nearly as possible in its original condition.

b. There shall be a complete search and inspection of each room/cell before it is occupied by a new inmate.

4. Property, supplies, goods and food stocks delivered to the institution shall be searched for contraband as specified by institutional policy and/or authorized by the Warden.

E. *Searches of Grounds and Buildings*

1. All areas of housing units which are accessible to inmates shall be subject to search daily. The times and patterns of the searches shall vary.

2. All closets, storage areas, pipe chases and utility areas shall likewise be searched systematically.

3. Program areas, including but not limited to the following, shall be searched systematically.

a. Work and vocational shops

b. School rooms

c. Libraries

d. Gymnasiums

e. Yards

f. Dayrooms

g. Hallways

h. Hospitals/infirmaries

i. Kitchens and dining rooms

j. Visiting galleries

k. Meeting rooms

l. Inmate service areas.

4. The following areas should be searched frequently

a. Parking lots

b. Fencelines and perimeters

c. Checkpoint, vehicular and sally port gates

d. Transportation vehicles

e. Inmate reception area.

F. *Disposition of Contraband*

1. Any inmate found to be in possession of contraband shall be subject to disciplinary action. Possession of illegal items may result also in prosecution in a court of law.

2. Visitors found in possession of contraband shall be denied their visit and further subject to the actions outlined in Policy # 507.01.

3. Employees found in possession of contraband shall be subject to disciplinary action.

4. Visitors and employees found in possession of illegal items shall be referred to a law enforcement agency for prosecution.

5. All detected contraband shall be handled in accordance with Policy # 506.15.

G. *Searches in Minimum Security*

1. All inmates designated as minimum security shall be rigorously searched whenever they have occasion to enter or leave a more secure area of the institution.

2. Each Warden of minimum security housing/or program area(s) shall promulgate search policy for those inmates, visitors and employees according to the following guidelines:
   a. Searches of inmates should be restricted to frisk searches, unless probable cause exists for the Warden to authorize a strip, visual or manual body cavity search.
   b. Searches of visitors and employees should be conducted only on the basis of probable cause.
   c. Searches of grounds, buildings and personal property should be random and periodic rather than daily or routine.

H. *Records*

1. The Warden or Associate Warden of Security/Captain shall maintain a file record of all Forms # CR-2156 submitted.
2. He/she shall further maintain a weekly account of the patterns, frequency and types of searches conducted in housing units and of grounds and buildings.

I. *Posting*

1. Each Warden shall cause signs to be posted conspicuously
   a. At the mouth of all entrance roads to institutional grounds
   b. At all checkpoint and vehicular gate entrances.
2. Visitors to the institution shall be advised
   a. That all persons and property are subject to search.
   b. That drugs, alcohol and firearms are prohibited.

[SAMPLE]

TENNESSEE DEPARTMENT OF CORRECTION
AUTHORIZATION FOR SEARCH

Date of Search: _____ Location/Institution: _____

Type of Search: ☐ Strip
☐ Visual Body Cavity
☐ Manual Body Cavity
☐ Personal Vehicle

Subject of Search: _____
(Name of Person)

☐ Inmate
TDOC # _____

☐ Visitor
Address: _____

☐ Employee
Address: _____

_____ is hereby authorized to conduct
(Name of Officer/Position)

the above specified search of the named subject. I have been informed and believe there is good cause based on the following:

_____

_____

to authorize that the search be conducted for the purpose of detecting contraband.

_____
Signature of Warden/Designee

_____
Position Date

ADMINISTRATIVE POLICIES AND PROCEDURES

State of Tennessee
Department of Correction

Index # 506.06

Effective Date: February 1, 1982

Distribution: B

[SEAL] Supersedes: N/A

Approved by: /s/ H. B. Bradley

Subject. SEARCHES

I. *AUTHORITY*: TCA 4-3-603, TCA 4-3-606

II. *PURPOSE*: To standardize approved methods for Department of Correction (TDOC) staff to search visitors, employees, inmates, inmate housing units and other areas of the facility.

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E. *Room or Area Search*: A thorough inspection of a housing unit, a cell or room or any other area and of all items and furniture therein

F. *Contraband*: Any item which is not permitted or is expressly prohibited by TDOC or institutional policy

G. *Visitors*: Persons other than TDOC employees or inmates who seek to enter the gates or grounds of the institution

H. *Employees*: All workers, civil service or non-civil service, on the staff or payroll of any division, institution or office of the TDOC

I. *Probable Cause*: A belief, based on information which is more than mere suspicion, that an allegation is likely true; a level of proof which lends good cause to the taking of an action.

V. *POLICY*:

A. Frequent unannounced searches of visitors, employees, inmates, inmate's quarters and other areas of the facility shall be conducted as often as necessary to ensure the safety and security of the facility. Searches are conducted to detect and prevent the introduction of contraband, to recover missing or stolen property and to prevent escapes and other disturbances. Searches shall be conducted in a manner which will avoid unnecessary force, embarrassment or indignity to those whose person and/or belongings are being searched.

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d. Gymnasiums

e. Yards

f. Dayrooms

g. Hallways

h. Hospitals/infirmaries

i. Kitchens and dining rooms

j. Visiting galleries

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l. Inmate service areas.

4. The following areas should be searched frequently.

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b. Fencelines and perimeters

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2. Visitors to the institution shall be advised

   a. That all persons and property are subject to search.

   b. That drugs, alcohol and firearms are prohibited.

[SAMPLE]

TENNESSEE DEPARTMENT OF CORRECTION
AUTHORIZATION FOR SEARCH

Date of Search: _____ Location/Institution: _____

Type of Search: ☐ Strip
☐ Visual Body Cavity
☐ Manual Body Cavity
☐ Personal Vehicle

Subject of Search: _____
(Name of Person)

☐ Inmate
TDOC # _____

☐ Visitor
Address: _____

☐ Employee
Address: _____

_____ is hereby authorized to conduct
(Name of Officer/Position)

the above specified search of the named subject. I have been informed and believe there is good cause based on the following:

_____

_____

to authorize that the search be conducted for the purpose of detecting contraband.

_____
Signature of Warden/Designee

_____
Position Date

[SEAL]

ADMINISTRATIVE POLICIES AND PROCEDURES

State of Tennessee
Department of Correction

Index #507.01

Effective Date: March 1, 1982

Distribution: B

Supersedes: 63 (9-17-76)
60 (7-29-76)

Approved by: /s/ H. B. Bradley

Subject: VISITATION

I. *AUTHORITY*: TCA 4-3-603, TCA 4-3-606.

II. *PURPOSE*: To establish Departmental guidelines governing the visiting of inmates.

III. *APPLICATION*: To Wardens, employees and inmates.

IV. *DEFINITIONS*:

Immediate Family: Husband, wife, father, mother, sons, daughters, grandparents, grandchildren, stepchildren and in loco parentis.

V. *POLICY*: It shall be the policy of the Department of Correction (TDOC) to allow inmates visitation privileges within specified guidelines.

A. Regulations pertaining to visiting shall be available to all staff, inmates and visitors. It shall be sufficient notice if this information is conspicuously posted.

B. The supervision of visits shall be sufficient to ensure contribution to good public relations, to develop the public's understanding of institutional programs and to assist in the positive development of inmate program planning.

C. The number of visitors an inmate may receive at a given time and the duration and frequency of each visit shall be limited only by the institution's space and personnel resources. Hours and visits shall not interfere with the inmate's work, school or training schedule.

D. Visiting privileges shall be suspended only upon orders from the Warden or designee, except where the suspension is imposed as part of a formal disciplinary proceeding. (Visiting may be suspended as a disciplinary sanction only when the offense specifically involves visiting, except that inmates on punitive segregation shall not be allowed regular visits.) A notice shall be given to both the inmate and the visitor of the reasons for the suspension.

E. All institutions shall provide visiting areas for inmates and their guests which allow reasonable ease and informality of communication in a natural environment as free from security constraint as is safely possible. The areas should allow for publically acceptable physical contact during visiting.

IV. *PROCEDURES*:

A. *Approval and List*

1. A list of approved visitors shall be recorded during the period of each inmate's initial classification. (See Policy #401.03)

2. Blank copies of Form #CR-2152 shall be furnished to all inmates, with instructions that prospective visitors may complete and return the forms to the Associate Warden

of Security/Captain at the address of the institution.

3. When a visitor is approved, written notice shall be given the inmate, who can in turn notify the visitor.

4. No visitor(s) shall be admitted for visitation until approval is given, except for visitors of newly received inmates. In such instances, the Warden shall cause the names of the inmate's immediate family members to be tentatively added to the approved list, pending the receipt of the relative's application.

5. If the Associate Warden of Security/Captain and the Associate Warden of Treatment concur in approving the applicant visitor, the name shall be added to the inmate's list (see Form #CR-2153 below). If the Associates disapprove the applicant or if the Associates do not agree, the Warden shall make the final decision.

6. Approval of visitors shall be in accordance with the following:

   a. Persons under the age of 18 may visit only with the permission of their parent or guardian.

   b. Persons with past criminal records shall not be automatically excluded from visiting. The nature and extent of an individual's criminal record and his/her history of recent criminal activity shall be weighed against the benefits of visitation in determining visitation eligibility.

   c. Ex-inmates of the Tennessee Department of Correction who are members of the inmate's immediate family may be approved. All other former TDOC in-

mates [shall] may be [disapproved] approved at the warden's discretion. (Per D. Greer 6-8-82 LAP).[*]

d. Persons, shown by substantial evidence, to be of harmful effect to the inmate or to constitute a threat to the security of the institution shall not be approved.

e. All immediate family members who apply and eight additional adults may be approved.

f. Children under 12 years of age may visit without being on the Approved Visitors List. However, on the occasion of each visit they must be accompanied by an approved visitor who is over age 18.

g. Members of the clergy, as recognized by the chaplain or Warden, need not be placed on the Approved Visitors List.

h. Attorneys need not be placed on the Approved Visitors List.

i. Any falsification of the Form #CR-2152 by a visitor may be cause to deny approval or to withdraw approval.

j. Deletions or additions to the approved list shall be made throughout the inmate's incarceration by the same application and approval system cited above.

B. *File*

1. Approved visitors shall be entered on a page of Form #CR-2153 in the inmate's visitation file. (See paragraph A 1 above)

a. [Date received is the date the inmate was admitted to TDOC custody.]

[*] Bracketed material struck through on original.

b. Subsequent transfers shall cause the receiving institution's name to be entered.

2. All copies of Form #CR-2153 received from visitor applicants shall likewise be maintained in this file, clearly marked approved or disapproved with the signatures of the Associate Wardens and/or Warden. (See Section A above)

3. All of these documents shall subsequently be transferred as a part of the inmate's institutional file, whenever the inmate is assigned to a different institution. (See Policy #403.01.1)

4. Each institution shall maintain a record of the names of all visitors admitted to the institution to visit inmates (see Policy #506.05). This record may be maintained together with and/or separate from the inmate's visitation file. In either case, the record of visitors admitted for visits shall remain at the institution where the visit occurred.

5. When an individual is not placed on an approved visiting list, a written notice of the exclusion and the reasons therefore shall be given to the inmate who submitted the individual's name. The inmate may appeal the decision via the grievance procedure. (See Policy #501.01)

C. *Schedule*

1. The Warden shall establish a schedule of visiting which includes at least the hours of one evening per week, Saturdays, Sundays and State holidays. Institutional space and personnel resources shall be the only

reasons to limit the number of visitors or length and frequency of visits.

2. The visitation schedule for segregated inmates shall accommodate the number of visitors, length and frequency of visits mandated by Policy #506.16.
   a. Because of their security requirements and/or status, staffing resources make limitations necessary.
   b. Because of their security requirements, limited staffing resources dictate that punitively segregated inmates shall not be allowed visits during the tenure of their segregation. (See Policy #506.16)
3. During an institutional emergency, visitation may be cancelled as deemed appropriate by the Warden.

D. *Security*

1. Sign(s) shall be conspicuously posted at the road(s) and checkpoint entrances to each institution stating: ALL PERSONS AND VEHICLES SUBJECT TO SEARCH. FIREARMS, WEAPONS, DRUGS AND ALCOHOL PROHIBITED. VIOLATORS SHALL BE PROSECUTED.
2. Visitors shall not enter any areas of the institution except for approved visitation areas and approved routes to and from those areas.
3. All visitors shall be frisk searched routinely as approved by institutional policy. (Any other search shall be in compliance with Policy #506.06.)
4. The Warden or Associate Warden of Treatment may approve the following types of

special visits. If absolutely necessary, they may be approved for hours other than those regularly scheduled or for duration longer than regularly scheduled.

a. Visitors who have traveled great distances

b. Children, as part of a special program to promote family bonding

c. Attorneys (See Policy #105.09)

d. Prospective employers, sponsors or parole advisors, or private therapists (recognized mental health professionals)

e. Persons significant to the inmate for purposes of crises intervention

f. Official visitors.

5. If contraband is found on the person or in the clothing of a visitor, the contraband shall be confiscated and the visitor detained for law enforcement officials as per TCA 41-350. An incident report shall be submitted. (See Policy #103.02)

6. A visitor's refusal to be searched shall be sufficient cause for denial of the visit.

7. Visitation conduct rules shall be conspicuously posted in all visiting areas.

E. *Denial, Termination and Suspension of Visits*

1. The intended visit may be denied by the officer in charge of checkpoint.

a. If the visitor refuses to show appropriate and bonafide identification.

b. If the visitor refuses to submit to a search

c. If the visitor is under the influence of drugs or alcohol.

d. If there is insufficient space for visiting

2. Prior to termination of a visit, less restrictive measures may be used such as warning the inmate and/or visitor(s). However, visits may be terminated by the officer on duty and in charge of the visiting area if
   a. Visitors violate visitation conduct rules
   b. Visitors fail to control children
   c. Visitors and inmates engage in publically unacceptable physical contact.
3. Visiting privileges may be suspended for up to six months by the Warden if
   a. During the visit it becomes apparent that visitor and/or inmate have become inebriated
   b. Visitor repeatedly violates visiting rules
   c. Visitor continually fails to control children
   d. Visitor will not after several warnings refrain from publically unacceptable physical contact
   e. Visitor's behavior or actions jeopardize the security of the institution.
4. Whenever a visit is denied or terminated, a detailed report in written memorandum shall be prepared by the official taking the action. A copy of the memo shall be given to the inmate and to the visitor. The statement of reasons may be limited to the extent it would jeopardize the security of the institution or the safety of any individual.
5. Only the Warden or designee can suspend visitation privileges, and then only for good cause.

a. The Warden shall decide, upon reviewing a denial/termination of visit memorandum, whether or not to issue a suspension (which can range from two weeks to six months depending on the severity of the infraction).

b. If the visitor was arrested (see paragraph D 4 above), his/her visitation privileges shall be suspended pending disposition of the case and may be suspended for

(1) Any portion of six months or

(2) The duration of any court sentence including terms of probation, incarceration and parole, and

(3) The visitor shall be subject to reapply for the privilege in accordance with Section A above.

c. All suspensions imposed shall be for definite periods of time.

F. *Hospital Patients*

1. Inmates who are patients in institutional hospitals shall be allowed visits in a time, place and manner as scheduled by the Warden on a regular basis provided that the attending physician allows it. Visits to such hospitalized inmates shall of necessity be of short duration.

2. Inmates who are patients in outside hospitals shall not be allowed visits, unless

a. The hospitalization exceeds two weeks duration, or

b. The inmate is in critical condition, and

c. The Associate Warden of Treatment and the Associate Warden of Security concur in approving the visit.

3. Visitation shall be restricted to a maximum of one-half hour per day per approved visitor during established hospital hours.

4. Hospital visiting rules as well as TDOC rules are to be obeyed.

5. No gifts, food or packages shall be allowed inmate patients.

6. Visits shall be subject to termination and/or suspension under the same criteria as with institutional visitation.

7. The officer(s) in charge shall maintain a log of names of each visitor, time of arrival and time of departure. That log shall become part of the record referenced in paragraph B 4 above.

G. *Volunteer Visitation*

1. This program functions as a separate entity from the regular visitation program. (See Policy #115.03)

2. Although locally coordinated and monitored by the institutional volunteer coordinator and more globally by the Director of Volunteer Services in the Central Office, the Warden maintain control and responsibility for this program.

3. Recruitment, orientation and assignment of volunteers is handled by the volunteer coordinator under direction of the Director of Volunteer Services.

4. The volunteer coordinator, following orientation and assignment, submits the names of volunteers who are to visit with the respective inmate to the Associate Warden of Treatment for adding to the inmate's Approved Visitors List.

H. *Transportation*

1. Visiting areas staff shall maintain up-to-date information regarding public transportation routes; an area street map shall be used in which the transportation routes are marked as to their proximity to the institution. The map shall be posted in all visiting or checkpoint areas.

2. Upon request, visiting room staff shall inform visitors of available public transportation and/or existing volunteers transportation programs. Local bus schedules and taxi phone numbers shall be posted in all visiting or checkpoint areas.

I. *Visitation Areas*

1. All visits shall take place in areas designated by the Warden.

   a. Minimum security designated inmates shall be given the most flexibility and choices about areas for visitation.

   b. Maximum and close security designated inmates shall be restricted to more secure areas for visiting due to supervision precautions which must be taken. Segregated inmates shall likewise be restricted.

   c. Attorneys and inmate clients shall, upon request, be afforded privacy for their visits.

   d. All picnic visitation areas shall be reserved for use by inmates designated as minimum or medium custody who are also earning PPSC credits (see Policy #505.01) or who would otherwise be

earning it except for their Felony X conviction.

(1) Picnic areas shall be utilized during the months of March, April, May, June, July, August, September, October and November only.

(2) Medium secuirty inmates shall have access to these areas no more frequently than once each week during the season.

(3) Minimum security inmates shall have access to these areas no less frequently than once each week.

(4) The use of a picnic visitation areas may be contingent upon grading levels. (See Policy #503.03)

2. Vending machines may be furnished in visitation areas.

J. *Property of Visitors*

1. Except for privileged official visitors as specified in Policy #507.02, visitors shall not be allowed to deliver packages, correspondence, money or printed materials to inmates. All such items shall be mailed.

2. Visitors shall not be allowed to bring any items in their hands or pockets into visitatation areas except

a. Unopened pack of cigarettes or cigars or pipe tobacco and/or pipe

b. Book of matches

c. $2.00 in coin(s)

3. All other items shall be placed by the visitor in lockers, if provided, or in their cars.

4. The following items only may be brought by visitors into picnic areas.

   a. Commercially prepackaged and unopened foodstuffs (including raw meats and vegetables) nonalcoholic beverages

   b. Self-starting (no lighter fluid needed) charcoal

   c. Plastic utensils and tableware, paper napkins.

[SAMPLE]

TENNESSEE DEPARTMENT OF CORRECTION

NAME: _____

Approved Visitors List

TDOC NUMBER: _____

CURRENT INSTITUTION: (1) _____ (2) _____

(3) _____ (4) _____ (5) _____

FAMILY INFORMATION:

Name	Relation	Birthdate	Mailing Address	Date Approved

[SAMPLE]

TENNESSEE DEPARTMENT OF CORRECTION

_____

(Institution Name)

VISITATION APPLICATION FOR _____

(Inmate Name)

_____

(TDOC #)

READ CAREFULLY: All questions must be answered. Any omissions or falsifications will be considered sufficient reason for denial of approval for visitation. Please attach recent photograph in lower left hand corner or application will not be processed. Return this form to the inmate or institution above.

Name

_____

(First) (Middle) (Last)

Correct mailing address _____

(Street) (City) (State) (Zip)

I _____ wish to visit with this inmate _____.

(do/do not) (frequency)

Date of Birth _____ Occupation_____

Employer

_____

(Name) (Phone Number)

_____

(Address)

Marital Status

_____

My exact relationship to inmate is _____.

I have known this inmate for ——— years or ——— months.

Have you ever been on the visiting list of an inmate confined in the Tennessee Department of Correction? YES NO If yes, what was or his his/her

Name ——— Number ——— Relationship ———

Have you ever been convicted of a felony? YES NO
If yes, please list ———

——— Your Signature: ——— Date ———

NOTE: If you are over 12 but under 18 years of age, your parent or guardian's approval must be indicated by signature here, and they must also contact the Associate Warden of Security/Captain.

Signature ——— Date ———

☐ Approved ——— Date ———
☐ Disapproved Associate Warden of Security/Captain

☐ Approved ——— Date ———
☐ Disapproved Associate Warden of Treatment

☐ Approved ——— Date ———
☐ Disapproved Warden

POLICIES AND PROCEDURES
MORGAN COUNTY REGIONAL
CORRECTIONAL FACILITY

Index #507.01-1

Effective Date: 11-27-84

Supersedes: 507.01-1 (01-06-84)

Approved by: /s/ [Illegible]

Subject: VISITATION

PURPOSE: To establish Institutional guidelines for administering the Visitation Program at the Morgan County Regional Correctional Facility in conjunction with Departmental Policy #507.01.

APPLICATION: To all Institutional Visitation Staff and inmates.

DEFINITIONS: Immediate family—husband, wife, father, mother, sons, daughters, grandparents, grandchildren, stepchildren and in loco parentis.

POLICY: It will be the policy of the Morgan County Regional Correctional Facility to allow inmates viistation privileges according to the following guidelines.

PROCEDURE:

A. Who may visit

1. Upon receiving an inmate at this institution, the visitation card should accompany him. In the event that we receive no card (CR-2153), one will be completed by the Visitation Coordinator, sub-

ject to approval by the Associate Warden of Security.

2. All immediate family members will be approved, after their application is received. (For ex-inmates who are immediate family members, See #8 of this section.)

3. All visitors requesting to be added to the approved visitation list will be mailed a copy of the Visitation Application (CR-2152) by the inmate. This includes immediate family members. CR-2152 forms will be kept in the Institution Library. These forms will be returned to the Visitation Coordinator or Associate Warden of Security.

4. Eight (8) additional adults may be added to the list, subject to approval.

5. Children under twelve (12) years of age may visit without being on the approved Visitors list. However, on the occasion of each visit they must be accompanied by an approved visitor who is over eighteen (18) years of age.

6. Persons between the age of twelve (12) and eighteen (18) may visit *only* with the permission of their parent or guardian. The parent's signature must be on the Visitation Application (CR-2152) indicating their approval and the parent or guardian must also contact the Associate Warden of Security. When visiting, they must be accompanied by an adult on the inmate's approved list.

7. No visitor(s) shall be admitted for visitation until approval is given except for visitors of newly received inmates. In such instances, the Warden shall cause the names of the inmate's immediate family members to be tentatively added to the approved list, pending the receipt of the relative's application.

8. Ex-inmates of the Tennessee Department of Correction who are members of the inmate's immediate family may be approved. After 90 days from release date, other former TDOC inmates may be approved at the Warden's discretion. (Per Asst. Comm. D. Greer—06-08-82)

9. Members of the clergy, as recognized by the Institutional Chaplain or Warden need not be placed on the approved Visitor's list. The Chaplain will provide checkpoint with a list of recognized clergy.

10. Attorneys need not be placed on the approved list. Special visits will be granted attorneys during non-visiting days, Monday through Friday, from 8:00 AM to 4:00 PM with any inmate who agrees to receive the visit. If attorneys arrive on Saturdays, Sundays or Holidays without an approved special visit, the Warden or Associate Warden of Security should be notified for approval. Attorneys and inmate clients, upon request, will be afforded semi-privacy for their visits. Inmates will be kept under the direct observation of the Officer. To leave a room and wait outside a door (closed or otherwise) causes the Officer to forfeit control of the inmate. This must not happen. While conferences with attorneys should be private, the inmate should remain under visual observation of the Officer.

11. No more than one (1) inmate may visit the same visitor at one time. However, the visitor must be on each inmate's visiting card or have an application approved.

12. When an individual is not placed on an approved visiting list, a written notice will be given by the Visitation Coordinator to the inmate submitting the name and reasons for denial. The inmate may appeal the decision via the Grievance Procedure.

B. Frequency of visits and number of visitors

1. Visitors will be allowed to visit on Saturdays, Sundays, and Holidays, from 8:00 AM until 4:00 PM and Monday nights from 7:00 PM until 9:00 PM. Visitation will be limited to two (2) hours in the inside Visiting Gallery. However, Minimum Security inmates visiting in the Picnic Area may visit from 8:00 AM until 4:00 PM, if they desire.

2. Visitors who arrive late in the day will be processed and permitted to visit until 4:00 PM. The time limit of any of the above is subject to extension by the Shift Officer in charge.

C. Visitors entry into institution

1. All visitors will register upon entering the institutional checkpoint, either minimum Picnic Area or inside Visiting Gallery. All visitors must show proper identification before they will be permitted to visit. Acceptable identification includes a current driver's license, birth certificate, marriage certificate, and/or voter's registration.

2. All visitors and vehicles are subject to search.

3. All visitors shall be frisk searched routinely as approved by Institutional Policy. (Any other search shall be in compliance with TDOC Policy #506.06.)

4. Visitors shall not enter any areas of the institution except for approved visitation areas, i.e., minimum Picnic Area, Visiting Gallery area and other special visiting areas designated by Institutional Policy.

5. The visitor's refusal to be searched shall be sufficient cause for the denial of a visit.

6. All children will be kept under control and at their table, unless going to the restrooms. If

children are not kept under control, the visitor and inmate will be warned. If the situation is not corrected, the visit will be terminated.

7. The inmate and visitor may embrace and kiss briefly at the beginning and end of the visit. They may hold hands during the remainder of the visit. These contact restrictions will not apply to small children.

D. Special permission may be granted by the Shift Officer in charge for extended visits for persons who have come long distances.

E. Denial, termination and suspension of visits

1. The intended visit may be denied by the Officer in charge of checkpoint if:

   a. the visitor refuses to show appropriate and bonafide identification.

   b. the visitor refuses to submit to a search.

   c. the visitor is under the influence of drugs or alcohol.

   d. the visitor is improperly dressed.

2. Prior to termination of a visit, less restrictive measures may be used, such as warning the inmate/visitor(s). However, visits may be termnated by the Shift Officer in charge when:

   a. visitors violate visitation conduct rules

   b. visitors fail to control children

   c. visitors and inmate engage in publically unacceptable physical contact.

3. Visiting privileges may be suspended for up to six months by the Warden if:

   a. during the visit it becomes apparent that visitor and/or inmate have become intoxicated.

b. visitor repeatedly violates visiting rules.

c. visitor continually fails to control children.

d. visitor will not after several warnings, refrain from publically unacceptable physical contact.

e. visitors' behavior or actions jeopardize the security of the institution.

4. When a visit is denied or terminated, a detailed report in written memorandum form shall be prepared by the official taking the action. A copy of the memo shall be given to the inmate and to the visitor. The statement of reasons may be limited to the extent it would jeopardize the security of the institution or the safety of any individual.

5. Only the Warden or designee can suspend visitation privileges, and then only for good cause.

   a. The Warden shall decide, upon reviewing a denial/termination of visit memorandum, whether or not to issue a suspension which can range from two weeks to six months, depending on the severity of the infraction.

   b. If the visitor was arrested, his/her visitation privileges shall be suspended pending disposition of the case and may be suspended for;

      1) any portion of six months or until disposition of the case is concluded.

      2) The duration of any court sentence including terms of probation, incarceration, or parole.

      3) The visitor shall be able to reapply for visiting privileges in accordance with section A above.

   c. All suspensions imposed shall be for definite periods of time.

F. Property of visitors

1. Except for privileged official visitors as specified in TDOC Policy #507.02, visitors shall not be allowed to deliver packages, correspondence, or printed material to inmates. All such items shall be mailed. All monies to be deposited shall be mailed in certified check, cashier's check, government check or money order form.

2. Visitors shall not be allowed to bring any items into the inside Visiting Gallery except:

   a. one unopened pack of cigarettes or cigars, or one unopened can of snuff, chewing tobacco, or one unopened pack of pipe tobacco and pipe.

   b. one book of matches.

   c. one set of car keys

   d. your entrance I.D.

   e. visitors who have infants will be allowed to take in one pacifier, two bottles and three diapers, per infant.

   f. two (2) dollars in change.

3. Minimum security inmates may receive visits on the minimum security Picinic Area at the discretion of the Shift Officer in charge. The visitors will be permitted to bring food while visiting on the Picnic Area. Charcoal can be brought into the Picnic Area by visitors. Every effort will be made by the Shift Supervisor to open the Picnic Area during visitation days.

4. Inmates will not be allowed to take food or any other items to the units from the Picnic Area.

G. How many visitors can visit an inmate.

1. Due to space limitations, the number of people visiting an inmate in the inside Visiting Gallery

at any one time should not exceed four (4) persons over twelve (12) years of age. The Shift Supervisor may grant a waiver of this rule. However, no limit will be placed on persons visiting minimum security inmates on the Picnic Area. Approved visitors only.

2. Any time a visitor leaves the inside Visiting Gallery or the Picnic Area the visit is terminated for that day.

H. Hospital visitation

1. Inmates who are patients in outside hospitals shall not be allowed visits, unless:
   a. the hospitalization exceeds two (2) weeks duration, or
   b. the inmate is in critical condition, and
   c. the Associate Warden of Security/Captain of Security has approved the visit.
2. Visitation shall be restricted to a maximum of one-half hour per day per approved visitor during established hospital hours.
3. Hospital visiting rules as well as TDOC rules are to be obeyed.
4. No gifts, food or packages shall be allowed inmate patients.
5. Visits shall be subject to termination and/or suspension under the same criteria as with Institutional Visitation.
6. The Officer(s) in charge shall maintain a log of names of each visitor, time of arrival and time of departure. The log will be filed in the inmate's Institutional File.

I. Extended visits between inmate and family, emergency visits.

1. Eligible inmates are allowed to receive two (2) three (3) day Furloughs in compliance with TDOC Policy #511.01.
2. This institution provides escorted emergency passes to inmates with verified serious immediate family emergencies who are hospitalized.

J. Visiting schedule for segregated inmates

1. Visiting for inmates on segregation will require the visitor to be escorted to a pre-designated area, set aside within the guild for visitation and closely monitored by the Officer in charge. After the visit has been terminated, the inmate will be strip searched prior to placing him back in his room.
2. At no time will there be more visitors present within the guild than the Officer can effectively supervise. If this should occur, an additional Officer will be required to maintain security and control.
3. Inmates on Punitive segregation shall not be allowed visits during the tenure of their segregation.

K. During an institutional emergency, visitation may be cancelled as deemed appropriate by the Warden or Shift Officer in charge, if the Warden cannot be contacted.

L. The procedure for adding people to visitation lists is as follows:

1. The inmate mails the Visitation Application (CR-2152) to the respective visitor.
2. The application will be mailed by the applicant to the Visitation Coordinator.
3. The Associate Warden of Security/Captain and Associate Warden of Treatment will approve or disapprove the request.

4. If approved, the Visitation Coordinator will add the person to the inmate's visiting list.

M. The procedure outlined in this policy may be waived by the Shift Officer in charge when, in his judgment, it is necessary for the good order and security of the institution; or when common sense would dictate deviating from the Policy in certain instances.

N. This policy will be reviewed annually by the Associate Warden of Security/Captain. Visitation procedures will be posted at the Minimum Security Picnic Area, all Checkpoints, Inside Visiting Galleries and the Library.

COORDINATION:

ASSOCIATE WARDEN/SECURITY

/s/ M.C. Hamby

ASSOCIATE WARDEN/ADMINISTRATION

/s/ [Illegible]

ADMINISTRATIVE POLICIES AND PROCEDURES
State of Tennessee
Department of Correction

[SEAL]

Index #113.78

Effective Date: May 1, 1982

Distribution: A

Supersedes: N/A

Approved by: /s/ [S. B. Bradley]

Subject: MEDICAL ROLE IN BODY CAVITY SEARCHES

I. *AUTHORITY*: TCA 43-603, TCA 4-3-606.

II. *PURPOSE*: To identify the role of health care providers in security searches of body cavities.

III. *APPLICATION*: To Wardens, Directors and Health Care Personnel.

IV. *DEFINITIONS*:

A. *Body Cavity or Orifice*—Ears, nose, mouth, vagina, anus

B. *Manual Body Cavity Search*—A manual inspection of the mouth, ear, nose, anal and vaginal cavity performed only by authorized medical or nursing staff, utilizing the fingers or appropriate instruments.

V. *POLICY*: When there is probable cause to believe that an individual may be concealing in a body orifice contraband that would threaten the security of the institution or its personnel the Warden/Director, or designated representative, may au-

thorize the manual search of a body cavity. (See Policy #506.06 Searches).

VI. *PROCEDURE*:

A. *Probable Cause for Search*

A body cavity search of an inmate/student, visitor, or staff member shall only be initiated when there is probable cause to believe that the individual has concealed contraband within a body cavity or orifice. Probable cause may be established from the following evidence:

1. Confidential information from a reliable source.
2. Irregularities found in the area of body cavities during an unclothed body search.
3. Observed actions or behavior resulting in reasonable cause to believe that the individual has contraband concealed in a body cavity.
4. Detection of contraband on the person of an inmate/student's visitor after physical contact, and with reasonable cause to believe the visitor's possession of contraband was for the purpose of smuggling it in or out of the institution.
5. Any other reasonable cause to believe that an inmate/student has contraband concealed in a body cavity.

B. *Authorization to Search*

Authorization to initiate a manual body cavity search of an inmate/student, visitor, or employee must be obtained from the Warden/Director, or his/her designee, after determining that there is probable cause. The authorizer of

such a search shall complete a Form CR#-2156 and forward it to the Associate Warden of Security for filing. (See Policy #506.06 Searches).

C. *Consent/Refusal of Body Cavity Searches*

1. Prior to the initiation of a manual body cavity search utilizing either the fingers or instrumentation, the recipient shall sign a consent form authorizing the performance of the search by a member of the health care staff. Form CR#-1897, Consent for Treatment may be utilized for this purpose.

2. Health care personnel shall not conduct body cavity searches on an inmate/student, visitor, or employee who refuses to submit to such a search. Health care personnel shall not participate in the forcible search of a body cavity. The refusal of an inmate/student, visitor or employee to submit to a body cavity/search shall be reported to the individual ordering the search.

   a. When it becomes apparent that an inmate/student has ingested or concealed contraband in his/her body and will not voluntarily surrender the contraband or submit to a search, the inmate/student may be placed in segregation under constant visual supervision until the contraband can be retrieved through natural means. This process of observavation shall be used as an alternative to forcible intrusion into body cavities when it is determined that the natural method is feasible and does not pose a hazard to the inmate/student.

b. Any visitors or employee refusing to permit a manual body cavity search shall be handled in accordance with Policy #506.06.

D. *Methods and Types of Searches*

The degree and intensity of the search shall be that least required to bring the search to a conclusion. As the search progresses, the inmate/student, visitor, or employee shall be given ample opportunity to voluntarily remove and surrender the contraband. In conducting any search of a person's body cavities, all persons involved must be sensitive to the personal dignity of the individual and the individual's right to privacy of their own body.

1. *Manual Body Cavity Search*: A manual body cavity search is always performed in the medical setting by trained health care personnel. The actual search of the body orifice may be performed by a Physician, Physician Assistant/Nurse Practitioner, Registered Nurse, or other appropriately trained health care personnel. All possible care shall be exercised to preclude injury during the search. A witness/chaperone of the same gender as the recipient of the search shall be present during the examination. The use of instrumentation (vaginal specula, anoscope, sigmoidoscope) shall only be used by Physician, Physician Assistants or Nurse Practitioners having specialized training in their use. Normally body cavity searches are conducted with a gloved finger and a lubricant for comfort of the recipient. Pregnant women shall not be searched beyond the first trimester.

2. *X-Ray Examination*: X-ray examinations for the purpose of confirming the ingestion of contraband or concealment of contraband in body cavity searches shall be utilized only on the approval of a medical doctor and under the same requirements and precautions as applies to x-ray examinations for other medical reasons. An x-ray examination shall be ordered and interpreted only by a physician, who may make recommendations regarding the least intrusive method to retrieve the contraband.

E. *Documentation*

Complete and detailed documentation via memorandum of all manual body cavity searches shall be submitted to the Warden/Director, or designee. The report shall be completed by the health care personnel conducting the search and include:

1. Circumstances which prompted the search.
2. Whether or not the individual consented to the search.
3. Whether or not any contraband was discovered.
4. Whether or not any injury was inflicted on the recipient of the search.
5. Names of persons participating in the search process.

F. *Preservation of Evidence*

1. If as a result of a search, contraband or evidence of illegal activity is found, the person conducting the search shall tag the evidence for identification, and turn it over to

the security supervisor. This should be documented in the report to the Warden/ Director. (See Policy #506.15).

2. Care must be taken to establish a clear chain of custody for such evidence. Such evidence must be maintained so as to preserve the specimen and to secure it from tampering, mutilation, or theft.

I certify that this is a true and exact copy of the original document.

/s/ [Illegible]
Notary Public

ADMINISTRATIVE POLICIES AND PROCEDURES

State of Tennessee
Department of Correction

Index # 501.01

Effective Date: January 1, 1982

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Supersedes: N/A

Subject: INMATE GRIEVANCES

I. *AUTHORITY*: TCA 4-3-603, TCA 4-3-606.

II. *PURPOSE*: To establish a Departmental policy that provides impartial address of inmate grievances.

III. *APPLICATION*: To all adult correctional facilities staff and inmates.

IV. *DEFINITIONS*:

A. *Grievance*: A complaint concerning the substance or application of a written or unwritten policy or practice and any behavior or action toward an inmate by staff or other inmates

B. *Reprisal*: An act of retaliation

C. *Emergency*: Generally unexpected occurrence or set of circumstances demanding immediate action.

V. *POLICY*: The Department of Correction ensures every inmate the right to utilize the grievance procedure without fear of reprisal. All grievances shall be considered in a fair and impartial manner and settled at the lowest possible level in the grievance procedure.

VI. *PROCEDURES*:

A. *Composition of Committee.* If the program capacity of the institution is over 200 inmates, the grievance committee shall be made up of five people. They shall include a chairperson who is a full time staff member, two other full time staff members who shall serve as members of the committee and two inmates, who shall serve as members. The committee should represent a cross section of the institutional staff, i.e., security, treatment and administrative services. If the institutional program capacity is under 200 inmates, the committee shall consist of three people. One chairperson, who is a full time staff member, one other staff member and one inmate shall make up the members of the committee.

B. *Staff Chairperson.* The Warden shall appoint the chairperson to serve a nine month term, subject to reappointment. The chairperson shall be a non-voting member, whose function is to facilitate consensus among the members.

C. *Staff Member.* These individuals shall be voting members of the committee. They shall be elected by the inmate population from a slate of five staff nominated by the administrative staff which includes department heads. They shall serve six month terms, subject to renomination. The staff member who receives the third highest number of ballots out of the slate of five nominees to the committee shall become the alternate. The alternate shall serve when a staff member of the committee is directly involved in the grievance or is absent or unable to attend the committee meeting. If the program capacity is below 200 inmates, the staff

member who receives the second highest number of ballots shall become the alternate.

D. *Inmate Member.* These individuals shall be voting members of the committee. They shall be elected by the administrative staff including department heads from a slate of five inmates nominated by the inmate population. They shall serve for six month terms, subject to renomination. The inmate who receives the third highest number of ballots out of the slate of five nominees shall become the alternate. The alternate shall serve unless an inmate member is directly or indirectly involved in the grievance or is unable to attend the meeting. If the program capacity is below 200 inmates, the inmate receiving the second highest number of ballots shall become the alternate. Any inmate on Death Row or administrative segregation, or who does not have reasonable movement inside the prison, shall be ineligible to serve. Each institution shall establish their own procedures for the nomination and election of members of the grievance committee.

E. *Removal from the Grievance Committee.* A committee member must be removed for cause and only on the recommendation of the Warden with approval of the Commissioner. The committee shall select a person to serve the unexpired term of the vacating member. This interim member is subject to renomination at the end of the expired term. If the committee selection is deadlocked, the Warden shall make the final selection.

F. *Matters Inappropriate to the Grievance Procedure.* An inmate may not use the Department's grievance procedure to:

1. Appeal or seek review of punishment imposed under established disciplinary procedures of the Tennessee Department of Correction
2. Address pay for job classifications
3. Appeal decisions or actions of the Board of Paroles or any agency outside of the Department of Correction
4. Address classification matters, such as institutional placement, security designation, etc.

G. *Access to the Grievance Procedure.* The institution shall make available grievance forms and depository to all inmates with no less than one depository for every 200 inmates housed at any given facility. Forms placed in the locked box depository shall be collected daily by a responsible staff member. Inmates who do not have access to the grievance depository, i.e., in disciplinary lock-up, medically detained shall give their completed grievance form to any staff member. That staff member personally is obligated to deposit that grievance in the depository before end of shift and/or working day.

H. *Inmate Clerk Duties.* An inmate clerk shall receive all grievances, record dates of filing of grievances and appeals, and forward information to the institutional grievance committee, the Warden and when necessary, the Commissioner. This inmate clerk shall be appointed by the Warden to serve a term of one year, subject to reappointment.

I. *Records.* A written record of all complaints filed shall be maintained in a central location.

All records are available for review by the grievance committee, the Warden, the Commissioner or other appropriate persons.

J. *Withdrawal of Grievance.* Informal resolutions of grievances will be encouraged. An inmate may make written withdrawal of a grievance at any level of the procedure. The grievance and the notice of withdrawal shall remain on file for review by the Warden or other appropriate persons.

K. *Advocates.* The inmate shall be entitled to choose an advocate representative. The advocate may participate in any conferences, hearings or reviews which include the inmate. The advocate cannot, however, be an attorney. The advocate must be an inmate with reasonable movement within the perimeter. Inmates on Death Row and administrative segregation would not be eligible.

L. *Rules and Regulations.* The committee shall adopt rules and regulations for the conduct of its proceedings.

M. *Extension of Grievances.* Grievances must be heard within the time frame allotted by this policy. Only the inmate can waive the grievance hearing and request an extension. This must be done in writing and filed with the grievance material.

N. *First Level of Review.* All grievances must be submitted on Form #CR-1394, Inmate Grievance, within seven days following the occurrence that gave rise to the complaint. Complaints regarding continuing practices or policy must be submitted within one week of the most recent time the inmates were effected. The chairperson shall review all grievances or

complaints and forward them for action to the first line supervisor of the department or employee involved in the grievance. Resolution will be attempted at that level within five working days after the complaint was filed. If deemed necessary, the chairperson may conduct any necessary investigation. A record of the chairperson's action and/or findings should be kept on file for review.

O. *Second Level of Review.* The chairperson shall set a time and place for the hearing within five working days of the filing of the appeal to the second level, notifying the inmate and the advocate. The hearing shall be scheduled so as to permit the inmate and the advocate to be present. If the grievance is against a staff member, the committee can request that that staff member and his/her supervisor be present. The committee will hear verbal presentation and review any pertinent written material. The committee shall send to the inmate a written response, using Form #CR-1393, Inmate Grievance Response, with reasons for their decision within five days of the hearing. The response should summarize the investigation conducted, information gathered, the committee's decision and supporting reasons. An appeal section shall be provided to the inmate as part of the written decision. If the committee's decision involves an institutional policy, their recommendation then shall be forwarded to the Warden for review. If the committee is deadlocked, the matter automatically shall be appealed to the Warden (third level of review).

P. *Third Level of Review.* The inmate may accept or reject resolution of the committee. In-

mates rejecting the resolution shall file an appeal with the Warden within five days of the receipt of the committee's decision. This requires placing Form #CR-1394 and Form #CR-1393 containing the written decision and appeal section and any additional written statement which the inmate or advocate may choose to attach to the appeal form in the complaint box. The Warden shall review the original complaint of the inmate, decision of the grievance committee and any additional written statements attached. Any further investigation or hearing on the complaint which the Warden determines to be appropriate shall be concluded. Within 10 days of the filing, the Warden shall provide written response to the inmate summarizing the investigation conducted, information gathered, the Warden's decision and supporting reasons. The Warden shall use Form #CR-1393. Grievances involving Departmental policy shall be referred to the next level.

Q. *Fourth Level of Review.* Appeals to the Commissioner must be filed within five days of the receipt of the Warden's decision. The inmate clerk shall ensure the Commissioner receives all pertinent written materials and information. The Commissioner may either hear the case or appoint a designee/committee to review the grievance and make recommendations. Within 20 days of the appeal or referral to the Commissioner, a written response (Form #CR-1393) summarizing the investigation conducted, the information gathered and the decision with supporting reasons shall be sent to the inmate. The recommendation of the Commissioner is not subject to appeal. It is the final step in the grievance procedure.

R. *Emergency Grievance.* An emergency grievance is one in which the time factor is such that if not handled immediately, the grievance could not be meaningfully resolved. The institutional grievance committee chairperson shall review the alleged "emergency" grievance to determine its status. If the grievance can be handled through routine grievance procedures, the chairperson then returns the grievance to the clerk for routine handling. If "emergency" status is determined, the chairperson shall forward the grievance to the Warden immediately. The Warden's decision shall be given in written form and is appealable to the fourth level. Each institution shall establish a delivery method to the chairperson or watch commander for emergency grievances.

S. *Grievance Regarding Title I Programs.* Public Law 45-561, Sections 128, 168, 184, requires that every local or state educational agency receiving Title I funds develop and implement a procedure for the resolution of complaints made by students, parents, teachers, advisory councils or other concerned organizations. A grievance filed regarding an alleged violation of a Title I program shall include a description of that violation and appropriate documentation. Department of Correction grievance procedures may be followed to resolve such a grievance save three unique components.

1. The complaint concerns a Title I violation.

2. The complaint may be forwarded directly by the agrieved to the Tennessee Department of Education, Office of Compensatory Education or to the U.S. Office of Education under certain circumstances.

3. Only the above mentioned individuals and/or groups have access to filing such grievances. Only Title I grievances are available to Department of Correction individuals not on the inmate category.

T. *Distribution of Grievance Copies.* When the grievance is settled, all related documentation shall be returned to the institution housing the agrieved inmate. Copies shall be placed in the grievance committee's file and the Warden's Office, and the original sent to the agrieved inmate.

U. *Monitoring and Evaluation.* The Warden or designated representative of each institution shall be responsible for monitoring and evaluating the grievance procedure to assure that grievances are resolved in a timely and efficient manner.

V. *Institutional Transfers.* An inmate who has filed a grievance, and who has a hearing date set, should not be transferred if at all possible until the second level hearing is complete. Further review (3rd level) can occur in the institution to which the inmate is being transferred.

Supreme Court, U.S.
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No. 91-156

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

OTIE JONES, INDIVIDUALLY AND AS WARDEN OF THE MORGAN COUNTY REGIONAL CORRECTIONAL FACILITY, and M. C. HAMBY, ASSOCIATE WARDEN,
Petitioners,

v.

MARIAM LONG, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review to decide the extent to which binding prison rules establish liberty interests, protected by the Due Process Clause, where there is a pending motion to amend the complaint, that, if granted, will allow respondents' claims -- that searches of family visitors to the prison were made without "reasonable suspicion" -- to be tried as a Fourth Amendment case, thereby rendering academic the Due Process issues raised by the petition?

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STATEMENT OF THE CASE

Respondents are three prison inmates and their wives and fiancé who were approved visitors at a Tennessee prison. Petitioners are the head warden and security warden at the prison who used their positions of authority to order strip, visual body cavity, and manual body cavity searches of the three women. Most significantly, the wardens ordered repeated warrantless searches of the female visitors, even after finding no contraband during any of the earlier searches.

Anita Simmers was subjected to visual body cavity searches on December 22, 23, 24 and 31, 1984, and on January 6, 1985, she was subjected to a manual body cavity search. Mariam Long was subjected to strip searches on July 13, 20 and 21, 1985. When she refused to undergo a manual body cavity search on October 6, 1985, Warden Jones sus-

pended her visits with her husband for 60 days. Karen Mills was subjected to a visual body cavity search on November 9, 1985, as well as on four dates earlier that year. The wardens ordered a manual body cavity search of her on October 5, 1985, but it was not conducted because Ms. Mills was having her menstrual period.

Tennessee prison regulations require "probable cause" -- defined as "more than a mere suspicion" -- before wardens can order such intrusive searches of visitors. TDOC Policy No. 506.06. Petitioners' Appendix ("Pet. App.") 28a. The wardens admitted that they authorized the searches without probable cause in violation of Tennessee prison regulations. Pet. App. 3a. In addition, the regulations, in mandatory terms, provide inmates a right to visits with approved visitors which the warden cannot suspend without "good cause." Pet. App. 53a, ¶ E5.

As construed by the court of appeals, the complaints in these three consolidated cases alleged two separate claims based on these facts. First, according to the court of appeals, respondents alleged that petitioners ordered the searches without probable cause and, therefore, violated the Fourth Amendment's prohibition against unreasonable searches. Second, respondents asserted that prison regulations prohibited searches in the intrusive manner involved here without probable cause and allowed inmates to have visitors unless there was good cause for denying them that right. After discovery had been completed, petitioners moved for summary judgment, claiming they were entitled to qualified immunity because their obligations were not clearly established at the time of the acts giving rise to these complaints. The district court denied that motion, and petitioners filed an interlocutory appeal.

The Sixth Circuit affirmed in part and reversed in part. First, it held that, for Fourth Amendment purposes, the standard governing searches of visitors was "reasonable suspicion," not "probable cause." Pet. App. 9a. It then construed

the complaints in these cases as relying on the absence of probable cause (*id.*), even though the complaints specified the more relaxed standard as a basis for the Fourth Amendment causes of action.*

Because of this ruling, the court then had to reach the alternative Fourteenth Amendment claim based on the wardens' repeated violations of their own regulations governing invasive searches and visitation rights. On this issue it agreed with respondents that they had a protected liberty interest for which there was no qualified immunity since the regulations clearly spelled out the wardens' obligations. Pet. App. 11a-12a. It is only this aspect of the ruling below on which petitioners seek review.

After the decision of the court of appeals, respondents filed a timely petition for rehearing, seeking to amend the decision to reflect the fact that their complaints asserted claims based on reasonable suspicion, a standard that was, as the court of appeals recognized, clearly established at the time that the actions of petitioners took place. Pet. App. 9a. When that request was denied without explanation, respondents moved the district court for leave to amend their complaints to correct what the court of appeals saw as a pleading defect. The district court has not acted on that

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* Defendants' policies and practices of compelling strip and manual body cavity searches of [plaintiff] in the absence of ***reasonable, articulable grounds to suspect*** her of attempting to smuggle drugs or other contraband by secreting them on her person is an infringement of her right to freedom of association and from unreasonable searches and seizures under the first, fourth and fourteenth amendments to the United States Constitution.

Long Complaint ¶ 61, Simmers Complaint ¶ 87, Mills Complaint ¶ 53. The italicized language was taken from *Hunter v. Auger*, 672 F.2d 668, 675 (8th Cir. 1982).

motion because of the pendency of this petition, although it is difficult to imagine the basis on which the motion could be denied. The evidence that will be offered under either the reasonable suspicion or the probable cause standard would be identical. *See* Fed. R. Civ. P. 15(a) ("leave shall be freely granted when justice so requires").

REASONS FOR DENYING THE WRIT

Review should be denied in this case because in all probability the correctness of the rulings on which *certiorari* is sought will not affect the outcome of this case. If, as seems likely, the district court grants the motion to amend, there will have to be a trial on the Fourth Amendment claim no matter how this Court might rule on the Fourteenth Amendment issues. Moreover, the facts regarding each of the searches and the basis, if any, on which petitioners ordered them will be the same under both legal theories. Thus, even if the Fourteenth Amendment claim were eliminated from the case, it would not alter the presentation of the proof on the remaining Fourth Amendment claim one iota. This Court should not devote its limited resources to resolving academic issues that will have no real effect on the final outcome of respondents' claims.

Even if the issues presented in the petition were not largely academic insofar as this case is concerned, and even if they independently merited review, this is not the appropriate case factually for resolving the question of the extent to which prison officials who violate their own regulations are liable under 42 U.S.C. § 1983. The Fourteenth Amendment's due process clause substantively prohibits and procedurally constrains state officials from taking arbitrary governmental action against citizens:

> The touchstone of due process is protection of the individual against arbitrary action of the govern-

ment.

Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

The wardens in this case seek protection from liability for their groundless searches and arbitrary interferences with visitation. The State of Tennessee, by adopting a regulation restricting the wardens' discretion to order intrusive searches, explicitly recognized the importance of protecting visitors from arbitrary and capricious action by prison administrators. In addition, Tennessee gives inmates a protected interest in visiting with approved persons. These regulations also protect approved visitors from repeated, warrantless and intrusive searches ordered in direct violation of regulatory standards for such searches. Finally, the interests of both inmates and approved visitors in visitation cannot be suspended without good cause. Respondents are entitled to have the courts "insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. at 557.

Although the courts have been understandably reluctant to interfere with state officials in their administration of prisons, there are plainly limits beyond which those officials cannot go. This is a case in which, if the factual allegations can be sustained at trial, damages are not merely permitted under the law, but essential to vindicate the rule of law. Whatever the limits may be beyond which the courts should not go in assessing civil liability for violation of prison rules, this case does not come close to reaching them. In short, this is a wholly inappropriate case to pass on the questions set forth in the petition.

The petition also raises the argument, for the first time in this protracted litigation, that the inmates could have used the inmate grievance procedure to contest the denial of visitation. The regulation that petitioners reproduced at Appendix 78a is not in the record in this case, and its applicability to these claims for damages was never assessed below. Moreover, on its face, the regulation covers only inmates. Three of the respondents are approved visitors, not inmates.

This Court should not rule on issues not considered by the lower courts and which, at most, would affect only some of the respondents.

Finally, the wardens ask the Court to grant them immunity so that "officials can act without fear of harassing litigation," Pet. at 9 n.2, citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984). They claim, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341 (1986)." *Id.* Even under their own criteria, petitioners are not entitled to the protection of the qualified immunity on which they rely. Their plea does not warrant the full consideration of this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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